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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether intentionally false, volunteered statements made to federal law enforcement officers are "within the jurisdiction of any department or agency of the United States," within the meaning of 18 U.S.C. 1001.

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v.

LARRY WAYNE RODGERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 706 F.2d 854. The order of the district court dismissing the indictment (App., *infra*, 5a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983 (App., *infra*, 7a). A petition for rehearing was denied on July 25, 1983 (App., *infra*, 8a). On September 14, 1983, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including October 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 2, 1982, a grand jury sitting in the Western District of Missouri returned a two-count indictment charging respondent with making false, fictitious and fraudulent statements and representations to the Federal Bureau of Investigation and the United States Secret Service, in violation of 18 U.S.C. 1001. Respondent moved to dismiss the indictment for failure to state an offense, and the district court granted his motion. App., *infra*, 5a-6a. The court of appeals affirmed. App., *infra*, 1a-4a.

1. The facts, as set forth in the court of appeals' opinion (App., *infra*, 2a), show that respondent telephoned the Kansas City, Missouri, office of the FBI on June 2, 1982, and reported that his wife had been kidnapped. The FBI spent more than 100 agent-hours investigating the alleged kidnapping; as a result, it determined that no kidnapping had occurred and that respondent's wife had left him voluntarily.

On June 15, 1982, respondent contacted the Kansas City office of the Secret Service and reported that his "estranged girlfriend" (actually his wife) had joined in a plot to assassinate the President. The Secret Service spent more than 150 hours of agent and clerical time investigating this threat and eventually located respon-

dent's wife in Arizona. She stated that she had left the Kansas City area in order to get away from respondent. Respondent subsequently confessed that he had made these false reports in order to induce the federal agencies to locate his wife.

2. The district court granted respondent's motion to dismiss the indictment, relying on the Eighth Circuit's holding in *Friedman* v. *United States*, 374 F.2d 363 (1967), that the investigation of a possible criminal violation is not a matter over which the FBI exercises "jurisdiction" in the sense that the term is used in 18 U.S.C. 1001. App., *infra*, 5a-6a.

The court of appeals affirmed, adhering to its reasoning in *Friedman* and finding that the same analysis applies to statements made to the Secret Service (App., *infra*, 3a). The court acknowledged that two other courts of appeals had reached a contrary conclusion on similar facts (*ibid.*), but it found its own prior analysis and reasoning "more persuasive" (*id.* at 3a-4a).

REASONS FOR GRANTING THE PETITION

This case presents a recurring and significant question concerning the scope of the federal false statement statute, 18 U.S.C. 1001. Section 1001 makes it a crime "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [to] * * * make[] any false, fictitious or fraudulent statements." The statute's proscription is clearly worded and is written in broad, sweeping terms. This Court has held on several occasions that the phrase "within the jurisdiction of any department or agency of the United States" should be accorded precisely the expansive construction that its language suggests. Notwithstanding the statute's unambiguous language and this Court's consistent liberal interpretation of it, however, the court of appeals here reaffirmed its holding in *Friedman* that "jurisdiction" in Section 1001 should not be given its literal meaning. The court of appeals per-

sisted in its view that "jurisdiction" refers only to an adjudicatory or regulatory power, and does not include the investigative authority of law enforcement agencies. In so holding, the Eighth Circuit placed itself squarely in conflict with the two other courts of appeals that have considered this issue. As a result, the volunteering of false information to law enforcement officers is subject to prosecution in some jurisdictions, while the same conduct escapes criminal sanction entirely in another. Moreover, if permitted to stand, the decision below will allow the willful perversion and disruption of official, authorized investigative functions of the FBI and the Secret Service, even though it was just such interference with the "authorized functions" of government that Section 1001 was designed to prohibit. *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941).

1. In *Friedman* v. *United States*, 374 F.2d 363 (1967), a divided panel of the Eighth Circuit held that a conviction under 18 U.S.C. 1001 could not be predicated on the defendant's false and volunteered complaint to the FBI of alleged mistreatment by state police officers, which the defendant claimed violated his civil rights. It based this ruling on the conclusion (374 F.2d at 365-366) "that the 'jurisdiction' of the F.B.I. to investigate crimes against the United States is not the 'jurisdiction' envisioned by § 1001."

Although the *Friedman* court acknowledged (374 F.2d at 366-367) that the application of 18 U.S.C. 1001 to the facts before it would be consistent with the literal language of the statute, it held that such an application would not comport with the "context * * * envisioned by the drafters" (*id.* at 366). The court relied heavily on the fact that the critical language—"in any matter within the jurisdiction of any department or agency of the United States"—was inserted in 1934, as "the government, at an accelerated pace, began entering the field of economic reform and regulation"

(*ibid.*). According to the court of appeals (*ibid.*), "the immediate and primary purpose in amending the * * * statute was to curtail the flow of false information to the newly created regulative agencies." Reasoning from that premise the court concluded (*ibid.*):

> Though the statute was drafted in broad inclusive terms, presumably due to the numerous agencies and the wide variety of information needed, there is nothing to indicate that Congress intended this statute to have application substantially beyond the purposes for which it was created.

The court implemented its conclusion by distinguishing (*id.* at 367) between the power "to make monetary awards, grant governmental privileges, or promulgate binding administrative and regulative determinations," and "the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action." According to the Eighth Circuit (*id.* at 368), Congress used the word "jurisdiction" in Section 1001 in only the former, more restrictive sense.

The court of appeals bolstered its decision by referring to 18 U.S.C. 1621, which prescribes a lesser maximum penalty than does Section 1001, and observing that Congress could not have "considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before a court of law." 374 F.2d at 366 & n.1. The court further opined (*id.* at 367) that "a literal application of the statute would completely remove the necessity for taking oaths." Finally, the court apparently was strongly influenced by its fear that adoption of the government's position would inhibit citizens from reporting suspected crimes to the police. *Id.* at 369.

Only four months after the Eighth Circuit rendered its opinion in *Friedman*, the Second Circuit rejected both the reasoning and the conclusion of that decision. In *United States* v. *Adler*, 380 F.2d 917, cert. denied,

389 U.S. 1006 (1967), the Second Circuit held that the president of a construction company violated 18 U.S.C. 1001 when, on his own initiative, he went to the local office of the FBI and told an agent there that he had been forced to pay bribes to government officials in the course of completing a construction contract at a government installation. Expressly rejecting the *Friedman* court's restrictive construction of the word "jurisdiction," the Second Circuit held (380 F.2d at 922) that the term "as used in the statute must mean simply the power to act upon information when it is received."

In so concluding, the court of appeals relied (380 F.2d at 921-922) on this Court's decisions in *United States* v. *Gilliland*, 312 U.S. 86 (1941), and *United States* v. *Bramblett*, 348 U.S. 503 (1955), which established a generally expansive and nonrestrictive construction of Section 1001. The *Adler* court also found (380 F.2d at 922) "the *Friedman* majority's restrictive interpretation of the word 'jurisdiction' as used in § 1001 * * * [ir]reconcil[able] with the broad interpretation applied to other terms in the statute." The court of appeals remarked (*ibid.*) that the only area in which the courts had demonstrated any reluctance to apply Section 1001 to criminal investigations was "the so-called 'exculpatory no' cases," in which the alleged violation of Section 1001 arises out of the defendant's negative response to a law enforcement officer's inquiry into his involvement in a crime. Yet, the court noted (*id.* at 922), even the "exculpatory no" cases had not uniformly been excepted from Section 1001 coverage.[1] In any event, the

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[1] Compare *United States* v. *Chevoor*, 526 F.2d 178, 182-184 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976) (Section 1001 inapplicable to "exculpatory no" situation); *United States* v. *Bush*, 503 F.2d 813, 818-819 (5th Cir. 1974) (same); *Paternostro* v. *United States*, 311 F.2d 298, 305, 309 (5th Cir. 1962) (same) with *United States* v. *Goldfine*, 538 F.2d 815, 821 (9th Cir. 1976) (refusing to limit applicability of Section 1001).

court stated (*id.* at 922), the "exculpatory no" cases are "readily distinguishable" from cases, such as the one before it, that involve an "affirmative, voluntary statement deliberately intended to provoke agency action."[2] With respect to the latter category of cases, the court of appeals concluded (*ibid.*):

> The making of intentionally false statements to the F.B.I. calculated to provoke an investigation by that agency may cause more "perversion" of authorized agency functions—and more harm to individuals—than false pecuniary and property claims which are clearly covered by the statute. There is nothing to suggest, either in legislative history or in the cases, that Congress in enacting § 1001 intended to conserve the energies of only certain agencies. Accordingly, a technical construction of the word "jurisdiction" which would exclude from the scope of § 1001 all matters strictly criminal in nature, is rejected, and we agree with the views of [the dissenting judge] * * * in *Friedman*, that individuals, acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F.B.I. Insofar as the penalty for a violation of § 1001 may exceed the penalty for perjury, the Supreme Court stated in [*United States* v. *Gilliland*, 312 U.S. at 95,] that "the matter of penalties lay within the discretion of Congress."

In *United States* v. *Lambert*, 501 F.2d 943, 945-946 (1974), the en banc Fifth Circuit expressly stated its preference for the Second Circuit's approach in *Adler*

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[2] As in *Adler*, the "exculpatory no" issue also is not presented and need not be reached here.

over the Eighth Circuit's in *Friedman*.[3] The court of appeals acknowledged the applicability of 18 U.S.C. 1001 to the defendant's volunteered, written statement, in which he falsely claimed that local police officers had physically mistreated him and violated his civil rights by arresting him for no reason, which statement "was intended to, and did, trigger an FBI investigation into the incident." 501 F.2d at 945. In the court's view (*id.* at 946), the defendant's statement carried a substantial potential for perverting a central function of the FBI: "Statements such as that given by appellant and falsely pointing to possible criminal conduct that is within the power of the FBI to investigate carry a substantial potential for wasting the Bureau's time and thus perverting its central function." Noting (*ibid.*) that "[p]erversion of a governmental body's function is the hallmark of a § 1001 offense," the court concluded (*ibid.*; footnote omitted) that the defendant's statement was "a 'matter within [FBI] jurisdiction' under § 1001." See also *United States* v. *Massey*, 550 F.2d 300, 305 (5th Cir. 1977).

In view of the Eighth Circuit's staunch adherence in this case to its holding in *Friedman*, notwithstanding its express acknowledgment (App., *infra*, 3a) that two other courts of appeals have rejected the *Friedman* analysis, there is a clear conflict among the courts of appeals concerning the meaning of the phrase "matter within the jurisdiction of any department or agency of

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[3] A panel of the Fifth Circuit initially had reversed the conviction in *Lambert*, adopting the reasoning of *Friedman* v. *United States*, *supra*. On the court of appeals' own motion, it granted rehearing and vacated the opinion of the panel. The court nevertheless reversed the conviction on the alternative ground that there was a fatal variance between the indictment and the proof. 501 F.2d at 946.

the United States," as used in 18 U.S.C. 1001. We therefore believe that this Court's review is now warranted.[4]

2. We further submit that the Second and Fifth Circuits were correct in concluding that Section 1001 applies to intentionally false statements volunteered to law enforcement agencies. Although this Court has not yet had occasion to reach the precise question presented by this case, our reading of the statute is strongly supported by decisions liberally construing the same phrase from Section 1001 that is at issue here. See generally Note, *Fairness in Criminal Investigations Under the False Statement Statute*, 77 Colum. L. Rev. 316, 318 (1977).

In *United States* v. *Gilliland*, 312 U.S. 86 (1941), the Court rejected the contention that, notwithstanding the substitution in 1934 of the phrase "in any matter within the jurisdiction of any department or agency of the United States" for the phrase "for the purpose and with the intent of *** defrauding the Government of the United States," (40 Stat. 1015), the statute should con-

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[4] In our brief in opposition to the petition for a writ of certiorari in *United States* v. *Adler*, *supra*, we argued (Br. in Opp. at 9 (No. 649, 1967 Term)) that *Adler* and *Friedman* were "not necessarily in conflict." As noted above (page 4, *supra*), the false statement in *Friedman* consisted of the defendant's complaint that a state police officer had mistreated him. In reversing the conviction in *Friedman*, the Eighth Circuit found (374 F.2d at 365) it "noteworthy" that the police officer "admitted that he had scuffled with Friedman while he was in custody * * *; and that Friedman admittedly had some small, observable injuries." Accordingly, we argued in the *Adler* opposition (at 9) that "the [*Friedman*] court considered the case as one where the defendant had made an exaggerated complaint rather than a totally baseless one," whereas *Adler* involved "a totally baseless charge." That distinction has been eliminated by the Eighth Circuit's adherence to *Friedman* in this case, which involves a "totally baseless" statement. See also App., *infra*, 6a n.1.

tinue to be restricted to cases involving pecuniary or property loss to the government. Rather, the Court explained (312 U.S. at 93), the purpose of the statute is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction."

It would be at odds with this statutory purpose to construe the term "jurisdiction" as referring only to rule-making or adjudicative power rather than to authority or power in general. Furthermore, the "within the jurisdiction" phrase was not meant to distinguish between different types of agencies or different official functions of a particular agency, but was intended only to differentiate between matters outside of or peripheral to the business of the department or agency involved and matters constituting the official, authorized functions of that body. As this Court noted in *Gilliland*, 312 U.S. at 93, it is the perversion and disruption of these "authorized functions" with which the statute is concerned. Here, the false charges made by respondent predictably set into motion the official, authorized investigative functions of the FBI and the Secret Service, causing the time and energies of several agents and other employees to be diverted from other, bona fide investigations to aid in the search for respondent's estranged wife. In short, respondent, for his own purposes, willfully perverted the agencies' authorized function of investigating alleged criminality.

The phrase "within the jurisdiction of any department or agency of the United States" also was construed broadly in *United States* v. *Bramblett*, 348 U.S. 503 (1955). In that case the Court upheld the conviction under Section 1001 of a former member of Congress for having falsely represented to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his official clerk. The Court

rejected the defendant's contention that only an executive agency could constitute a department or agency of the United States within the meaning of 18 U.S.C. 1001. In so holding, the Court observed (348 U.S. at 507-508; footnotes omitted):

> There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted. There was certainly no suggestion that the new phrase ["in any matter within the jurisdiction of any department or agency of the United States"] was to be interpreted so that only falsifications made to executive agencies would be reached. Apparently the *** phrase was inserted simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached.

The Court most recently construed the word "jurisdiction," as used in Section 1001, in *Bryson* v. *United States*, 396 U.S. 64 (1969). The petitioner in *Bryson* had been convicted under 18 U.S.C. 1001 for filing an affidavit, required by then existing Section 9(h) of the National Labor Relations Act, 29 U.S.C. (1958 ed.) 159(h), in which he falsely denied affiliation with the Communist Party. *Bryson* involved a collateral attack on that conviction on the basis of the alleged unconstitutionality of Section 9(h).

This Court affirmed the denial of collateral relief, holding (396 U.S. at 68-69) that the constitutionality of Section 9(h) was irrelevant to the validity of Bryson's conviction since "none of the elements of proof necessary for [Bryson's] conviction under § 1001 has been shown to depend on the validity of § 9(h)." Of particular relevance to the present case is the Court's rejection of Bryson's contention (396 U.S. at 70) "that if § 9(h) was unconstitutional, then the affidavit requirement was not within the 'jurisdiction' of the Board, and therefore the false statement was not punishable under

§ 1001." Relying on its prior decisions in *Bramblett* and *Gilliland* for the proposition (396 U.S. at 70) that "there is a valid legislative interest in protecting the integrity of official inquiries," the Court concluded (*ibid.*) that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001."

The court below attempted to distinguish *Bryson* on the ground (App., *infra*, 4a) that "[t]he NLRB is an agency with the power to adjudicate rights and establish regulations" and, therefore, "under the *Friedman* rationale, would be distinguishable from agencies such as the FBI and Secret Service." In fact, however, neither the adjudicative nor the regulatory aspect of the NLRB's jurisdiction was necessarily involved in *Bryson*. Rather, the affidavit described in Section 9(h) was a prerequisite to the exercise of even the Board's investigatory and prosecutorial powers—*i.e.*, "to the making of an investigation by the Board and the issuance of any complaint for the benefit of the union in question" (*Leedom* v. *International Union of Mine Workers*, 352 U.S. 145, 148 (1956))[5]—precisely the type of "jurisdiction" that is exercised by the Department of Justice, the FBI and the Secret Service. Moreover, in holding (396 U.S. at 70) that the term "jurisdiction" "should not be given a narrow or technical meaning for purposes of § 1001," the Court relied directly (*id.* at 71) on the Second Circuit's decision in *United States* v. *Adler*, *supra*. Hence, although the Court in *Bryson* did not focus specifically on the type of

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[5] 29 U.S.C. (1958 ed.) 159(h) provided in relevant part (emphasis added):

> No *investigation* shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no *complaint* shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit * * *.

agency or the nature of the administrative function to which Section 1001 is applicable,[6] the Court's ready application of the statute to the facts of that case strongly suggests that the Eighth Circuit's highly technical distinction between types of jurisdiction will not withstand scrutiny.

Finally, as noted above (pages 4-5, *supra*), the *Friedman* court relied heavily (374 F.2d at 366) on the legislative history of Section 1001, in particular on the motivation for the addition of the language at issue here,[7] for its restrictive interpretation of the term "jurisdiction." But this Court has repeatedly examined the same legislative history and has found no basis for avoiding a literal application of this broadly worded statute. See *United States* v. *Bramblett*, 348 U.S. at 507-508; *United States* v. *Gilliland*, 312 U.S. at 93-95. Nor have we found anything in the scant history of the language at issue here that lends any support to the narrow construction the Eighth Circuit has placed on the statute.

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[6] The court noted in *Bryson* (396 U.S. at 71 n.10): "We have no occasion in the present context either to approve or disapprove *Friedman*'s holding."

[7] The amendment containing the "matter within the jurisdiction" language was "proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith." S. Rep. 1202, 73d Cong., 2d Sess. 1 (1934); 78 Cong. Rec. 11270-11271 (1934). The Eighth Circuit erroneously concluded from this statutory origin that the only purpose of the statute was to assure the receipt of accurate information by the newly created regulatory agencies. *Friedman* v. *United States*, 374 F.2d at 366.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-2495

UNITED STATES OF AMERICA, APPELLANT,

v.

LARRY WAYNE RODGERS, APPELLEE.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: April 12, 1983

Filed: May 9, 1983

Before LAY, Chief Judge, MCMILLIAN and JOHN R. GIBSON, Circuit Judges.

LAY, Chief Judge.

Larry Wayne Rodgers was charged in a two count indictment for making "false, fictitious or fraudulent statements" to federal agencies in violation of 18 U.S.C. § 1001 (1976).[1] Rodgers allegedly made sep-

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[1] Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

arate false statements to the Federal Bureau of Investigation (FBI) and the United States Secret Service regarding his estranged wife and an assassination plot against the President of the United States. The district court, the Honorable Howard F. Sachs presiding, relied on our decision in *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967), and granted Rodgers' motion to dismiss the indictment. The government appeals from this dismissal and asks that we reexamine our holding in *Friedman*. Because we find the reasoning and analysis in *Friedman* still valid, we affirm the judgment of the district court.

Rodgers telephoned the Kansas City, Missouri, office of the FBI on June 2, 1982, and reported that his wife had been kidnapped. The FBI spent over 100 agent hours investigating this alleged kidnapping; it was subsequently determined that the wife's disappearance appeared to be a domestic problem. A few weeks later Rodgers contacted the Kansas City office of the Secret Service and reported that his "estranged girlfriend" (actually his wife) had been induced to join an assassination plot against the president. The Secret Service spent over 150 hours of agent and clerical time investigating this threat and located Rodgers' wife in Arizona. She stated that she had left the Kansas City area to get away from Rodgers. Rodgers later confessed that he made these false reports to induce the federal agencies to locate his wife.

In *Friedman* we considered a similar factual situation. The defendant had contacted the FBI and made statements that induced the FBI to investigate a potential civil rights violation. The defendant's statements proved to be false. Judge Floyd R. Gibson, writing for the majority, reversed the defendant's conviction under section 1001. Judge Gibson concluded that the investigation into a possible criminal law violation was not a matter over which the FBI exercised "jurisdiction" as

that term is used in section 1001. The court analyzed the historical context of the statute, the social policy served by an open line of communication between the general public and law enforcement agencies, and the absurd effect a literal application of the statute would have on the perjury statutes. *See* 18 U.S.C. § 1621 (1976). The court concluded in order to effectuate the intended purpose of the statute the term "jurisdiction" must be defined restrictively to include only the positive powers that reside in an agency. We observed:

> The F.B.I. had authority to investigate, and in that broad sense it had "jurisdiction." However, it had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry. In this restrictive sense, the investigation of a possible violation of the criminal law is not a matter over which the F.B.I. exercises "jurisdiction." It is in this more restrictive sense, we believe Congress intended to use the word "jurisdiction" in determining violations of § 1001.

374 F.2d at 368.

On this basis we held section 1001 had no application to a false statement given merely to induce the FBI to conduct an investigation and the indictment should have been dismissed.

The reasoning of *Friedman* still soundly applies to false statements made to the FBI. The analysis applies equally as well to statements made to the Secret Service. We are not unmindful that two other courts of appeals have found that making false statements to the FBI constitutes a violation of section 1001. *See, e.g., United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc) (10-7); *United States v. Adler*, 380 F. 2d 917, 921-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).[2] However, we are not persuaded by those deci-

[2] The government also cites *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972), as authority contrary to *Friedman*. We do not read *Bedore* to be necessarily inconsistent with the

sions that the *Friedman* case should be overruled. *Friedman* was well-reasoned and thoroughly discussed the legislative history, policies, and existing case law. The *Friedman* definition of jurisdiction has been repeatedly approved by this court. *E.g.*, *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983).

The government contends the Supreme Court's decision in *Bryson v. United States*, 396 U.S. 64 (1969), mandates a different result. We must respectfully disagree. *Bryson* concerned a false statement made in an affidavit filed with the National Labor Relations Board pursuant to its explicit statutory authority. The NLRB is an agency with the power to adjudicate rights and establish regulations, and under the *Friedman* rationale, would be distinguishable from agencies such as the FBI and Secret Service. The Court expressly stated it had "no occasion in the present context either to approve or disapprove *Friedman*'s holding." *Id.* at 71 n.10. *See also United States v. Cowden*, 677 F.2d 417, 419 n.4 (8th Cir. 1982) (declining to comment on viability of *Friedman* in light of *Bryson*).

We find the more persuasive analysis and reasoning to be in *Friedman*. Therefore, we adhere to our prior decision and affirm the judgment of the district court.

Friedman analysis. *Bedore* held only that the giving of a false name to an FBI agent when questioned was not within the class of false "statements" proscribed by section 1001. *Id.* at 1110. *Bedore* did not turn on the definition of "jurisdiction."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LARRY WAYNE RODGERS, DEFENDANT.

No. 82-00127-01-CR-W-6

ORDER

Defendant was indicted by the Grand Jury on September 2, 1982 for allegedly violating 18 U.S.C. § 1001 by making separate false statements to the Federal Bureau of Investigation and the United States Secret Service, to the effect that his wife had been kidnapped and (later) was involved in a plot to assassinate the President. Pending is defendant's motion to dismiss the indictment. The motion was referred to Chief Magistrate Hamilton, who conducted a hearing and issued a report and recommendation, dated December 8, 1982. We adopt the report and recommendation of the Magistrate and grant the motion to dismiss.

Defendant relies on *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967). In that case the Court of Appeals for the Eighth Circuit held that the investigation of a possible criminal violation is not a matter over which the F.B.I. exercises "jurisdiction" in the sense that the term is used in § 1001. 374 F.2d at 368. The Court distinguished situations in which an agency has "power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry," *id.*, and stated its concern that allowing prosecution for the making of false statements to law enforcement officials would have a

chilling effect on the providing of information by citizens to those officials. *Id.* at 369.

Defendant's alleged conduct, as charged in the indictment, falls squarely within the *Friedman* holding.[1] Other courts of appeals have declined to accept the interpretation of § 1001 followed in *Friedman*, *see, e.g.*, *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974); *United States v. Adler*, 380 F.2d 917 (2d Cir), *cert denied* 389 U.S. 1006 (1967) and the Court of Appeals for the Eighth Circuit has expressly declined to confirm the continued viability of *Friedman*. *United States v. Cowden*, 677 F.2d 417 (8th Cir. 1982). Nevertheless, this Court must conclude that *Friedman* continues to represent the state of the law in the Eighth Circuit until such time as the Court of Appeals decides to the contrary. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the indictment is GRANTED.

/s/ Howard F. Sachs

HOWARD F. SACHS
United States District Judge

DATED: December 10, 1982

---

[1] One of the false statements charged was made to the Secret Service, rather than the F.B.I., but the rationale of *Friedman* would apply equally to investigations by the Secret Service. The government argues that, unlike the situation in *Friedman*, this case involves complaints not conceivably founded on any facts and contends that *Friedman* may be distinguished on this basis. While the factual circumstances of this case may be more egregious in terms of both the basis for and the seriousness of the complaints, the opinion in *Friedman* gives no indication that these factors should be balanced against the factors discussed by the court therein.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1982

No. 82-2495-WM

JUDGMENT

UNITED STATES OF AMERICA, APPELLANT,

v.

LARRY WAYNE RODGERS, APPELLEE.

Appeal from the United States District Court for the Western District of Missouri.

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the order of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

May 9, 1983

Order entered in accordance with opinion

/s/ Robert D. St. Vrain

Clerk,
U.S. Court of Appeals, 8th Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2495. September Term, 1982

UNITED STATES OF AMERICA, APPELLANT,

v.

LARRY WAYNE RODGERS, APPELLEE.

Appeal from the United States
District Court for the
Western District of Missouri.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross and Fagg would grant the petition for rehearing en banc.

July 25, 1983

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Office - Supreme Court, U.S.
FILED
JAN 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-620

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 13, 1983
CERTIORARI GRANTED DECEMBER 5, 1983

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RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Sept. 2, 1982	Indictment in two (2) counts
Sept. 2, 1982	Request for warrant of arrest Order for warrant of arrest Warrant issued and delivered to U.S. Marshal
Oct. 28, 1982	U.S. Marshal's return of warrant showing that defendant was arrested on October 15, 1982.
Nov. 15, 1982	Magistrate's courtroom minute sheet Omnibus hearing held on November 15, 1982 and report filed. Upon arraignment on November 15, 1982 deft. entered a plea of not guilty to the indictment. Bail fixed at $10,000.00 on November 8, 1982 which was not made and defendant committed to custody of U.S. Marshal
Nov. 16, 1982	Motion to dismiss for failure to state an offense with suggestions
Nov. 17, 1982	Order of reference to Chief United States Magistrate Calvin K. Hamilton
Nov. 17, 1982	Order setting an evidentiary hearing for 9:30 a.m., Tuesday, November 23, 1982
Nov. 17, 1982	Notice of pretrial conference set for 4:50 p.m., Wednesday, December 1, 1982 before the Honorable Calvin K. Hamilton
Nov. 19, 1982	Order that the evidentiary hearing on defendant's motion to dismiss the indictment shall be continued for a period of one week and is hereby set for 9:30 a.m., Tuesday, November 30, 1982. All stipulations of fact should be filed by that date.
Nov. 23, 1982	Response of government in opposition to the motion to dismiss for failure to state an offense with suggestions
Nov. 30, 1982	Notice of custody
Dec. 8, 1982	Report and recommendation
Dec. 8, 1982	Stipulation of facts in connection with defendant's pretrial motion to dismiss indictment
Dec. 10, 1982	Order that deft's. motion to dismiss the indictment is granted.
Dec. 10, 1982	Notice of appeal filed by plaintiff. Notice transmitted to Court of Appeals.

Dec. 10, 1982	Appearance bond in the amount of $2,500.00.
Dec. 14, 1982	Amended order specifying methods and conditions of release.
Dec. 16, 1982	Designation of Record and Statement of Issues on appeal by pltf./appellant.
Dec. 17, 1982	Designation of record by defendant.
Jan. 7, 1983	Transcript of proceedings taken on 12/03/82.
Aug. 16, 1983	Judgment from U.S. Court Of Appeals. ORDERED and adjudged that the order of the District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.
Aug. 16, 1983	Opinion from U.S. Court of Appeals.

RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dec. 13, 1982	Docketed Case.
Dec. 13, 1982	Certified copies of notice of appeal; docket entries; and order rec'd from District Court.
Dec. 13, 1982	Order: Mr. Raymond C. Conrad, Federal Public Defender for Western MO is hereby appointed to represent appellee in all matters.
Dec. 13, 1982	Briefing Schedule: Clerk's Record 1/4/83; Transcript 1/3/83; Brf. Aplnt 1/10/83; Brf. Aplee 1/31/83.
Dec. 20, 1983	Appearance for appellant.
Dec. 20, 1983	Appearance for appellee.
Jan. 14, 1983	Brief Appellant.
Feb. 2, 1983	Brief Appellee.
Mar. 14, 1983	Transferred to April session.
Apr. 12, 1983	Appearance for appellant
Apr. 12, 1983	Argued & submitted to Judges Lay, McMillian & J.R. Gibson. Cynthia Clark for Appellant United States. R. Steven Brown for Appellee Larry Wayne Rodgers.
May 9, 1983	Opinion by Law (published)
May 9, 1983	Judgment: Order of District Order is affirmed in accordance with opinion
June 27, 1983	Petition of appellant for rehearing with suggestions for rehearing en banc.
July 25, 1983	Order: Petition for appellant for rehearing and rehearing en banc is denied. Judges Ross and Fagg would grant the petition.
Aug. 12, 1983	Mandate issued.
Aug. 19, 1983	Receipt for mandate.
Sept. 20, 1983	Letter from Clerk of Supreme Court advising that an ext. of time has been granted by Mr. Justice Blackmun to and including Oct. 23, 1983.
Oct. 28, 1983	Notice of filing of petition for writ of certiorari as case No. 83-620 as of Oct. 13, 1983.
Dec. 7, 1983	Order of Supreme Court granting certiorari in case No. 83-620, dated December 5, 1983.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DISTRICT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LARRY WAYNE RODGERS, DEFENDANT.

Violation: Counts One and Two
18 U.S.C. § 1001
NMT 5 years and/or $10,000

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE
(18 U.S.C. § 1001; NMT 5 years and/or $10,000)

On or about the 3rd day of June, 1982, in the Western District of Missouri, LARRY WAYNE RODGERS, wilfully and knowingly did make a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the Federal Bureau of Investigation, Department of Justice, an agency of the United States, in that LARRY WAYNE RODGERS stated and represented that his wife, Ivy Lynn Gilmore, had been abducted and that he had received a ransom note, whereas in truth and fact, as he then well knew, Ivy Lynn Gilmore had not been abducted and he had not received a ransom note; all in violation of Title 18, United States Code, Section 1001.

COUNT TWO
(18 U.S.C. § 1001; NMT 5 years and/or $10,000)

On or about the 15th day of June, 1982, in the Western District of Missouri, LARRY WAYNE RODGERS, wilfully and knowingly did make a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the United States Secret Service, Department of the Treasury, an agency of the United

States, in that LARRY WAYNE RODGERS stated and represented that Ivy L. Gilmore had threatened to kill the President of the United States, whereas in truth and fact, as he then knew, Ivy L. Gilmore had not made a threat to kill the President of the United States; all in violation of Title 18, United States Code, Section 1001.

A TRUE BILL.

_____

Foreman of the Grand Jury

_____

ROBERT E. LARSEN
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 82-00127-01-CR-W-6

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LARRY WAYNE RODGERS, DEFENDANT.

STIPULATION OF FACTS IN CONNECTION WITH DEFENDANT'S PRETRIAL MOTION TO DISMISS INDICTMENT

Come now the parties, in person and by counsel, and hereby stipulate and agree that the following facts are true and correct for the purpose of the defendant's pretrial motion to dismiss the indictment for failure to allege an offense, and the government's response to that motion.

COUNT ONE

The Kansas City Federal Bureau of Investigation Office first became involved with this case on June 2, 1982, when an individual who identified himself as Larry Gilmore (true name Larry Wayne Rodgers), called and spoke with Federal Bureau of Investigation (FBI) employee Special Clerk Sue Cavanaugh. Rodgers said that his wife, Ivy Lynn Gilmore, was seven months pregnant and had been missing for three weeks. He also claimed that she had been seen by a friend in Topeka, Kansas, sitting in a van at a stop light and that when this friend "hollered" at her, the van sped away. Rodgers claimed that the friend said his wife was all bruised up. Rodgers, at that time, gave no indication that his wife had been abducted, and therefore he was told that the FBI had no jurisdiction. He was told that he should contact the Missing Persons Bureau of the local police department. Rodgers then said that the Kansas City Missouri Police Department had refused to take his report saying that it was a domestic matter.

On June 2, 1982, Rodgers again called Special Clerk Cavanaugh and said his wife had disappeared while he was at church and claimed that there were people who had seen

his wife abducted. He further stated that Detective Dempsey of the Kansas City Kansas Police Department was working on the case. According to Rodgers, Dempsey intended to bring the FBI into the case.

Attempts by Special Clerk Cavanaugh to contact Detective Dempsey were unsuccessful on June 3, 1982. On June 4, 1982, Detective Dempsey called the FBI and said that Rodgers called him about five times a day. Dempsey said that Rodgers did make a missing persons report on Rodgers' wife, but that there was no evidence of abduction in this matter. Dempsey said Rodgers named five or six people who were suppose [*sic*] to give statements about his wife's abduction but, upon contact, these people told Detective Dempsey that they had seen nothing.

Rodgers called Special Clerk Cavanaugh again on June 4, 1982, and June 7, 1982 about his wife's disappearance.

On June 5, 1982, at approximately 10:30 p.m., Special Clerk Paul Allen received a call from Rodgers, who gave an address of 4411 Puckett, Kansas City, Kansas. During this conversation, Rodgers said that on May 16, 1982, his wife, Ivy, disappeared from home and had not been heard from since. Rodgers said that the Kansas City Kansas Police Department was working on the case, which was assigned to Detective Dempsey. Rodgers also said that his brother-in-law, whom he did not identify, had received a ransom note on his door.

On June 7, 1982, Rodgers called the Topeka Kansas FBI Resident Agency and spoke with Special Clerk Ron Compton with a further version of the alleged kidnapping of his wife, claiming that notes had been left on his door demanding money. Rodgers also told Compton that he had spoken with an FBI agent named Allen.

Based on the kidnapping complaint Rodgers had made to the Kansas City FBI Office, Special Agent Robert H. Meredith on June 7, 1982, contacted Detective Tom Dempsey of the Kansas City Kansas Police Department Homicide Division, who said that he had been working on the Gilmore case, however, he was of the opinion that it was not a legitimate kidnapping but a domestic situation. Dempsey said that he had checked all possible leads and

eventually surmised that Rodgers was lying and that his wife had in fact left him voluntarily. Dempsey said that he found many inconsistencies and conflicting statements on the part of Rodgers as well as a failure on the part of Rodgers' "witnesses to the kidnapping", to support Rodgers' story. In addition, on June 7, 1982, Special Agent Meredith attempted to locate Rodgers at 4411 Puckett, Kansas City, Kansas, and discovered that this is a nonexistent address.

On June 8, 1982, Special Agent Robert H. Meredith contacted Rodgers' grandmother, Mrs. Kroker. Kroker said that she believed Ivy ran away from Rodgers, since she had done so frequently in the past, and that Rodgers was extremely distraught and emotional. Mrs. Kroker explained that Ivy was seven months pregnant and that Rodgers was concerned with getting his child. She said that Rodgers' first wife and son had left him, and that he was afraid that he would be left alone again.

On June 9, 1982, Special Agent Meredith was contacted by a private investigator, Joan Brady, Security Services, Incorporated, 11800 West 63rd Street, Shawnee, Kansas. Brady said that Rodgers had come to her using the name Larry Johnson and said that he did not know where his wife was and he wanted her to find his wife. Brady recalled that she thought the Rodgers were having marital problems. Brady received a call from Rodgers the morning of June 9, 1982, wherein he stated that he did not want the investigator to tell the FBI, but he felt his sister, Debbie Hickcox, knew the whereabouts of his wife, Ivy.

On October 15, 1982, Larry Wayne Rodgers was arrested by the FBI at Houston, Texas.

After being advised of his rights, Rodgers said that he was guilty of furnishing false information to the Federal Bureau of Investigation.

COUNT TWO

On June 15, 1982, Larry Wayne Rodgers, identifying himself only as "Bob", telephoned the Kansas City Secret Service Field Office, 811 Grand Avenue, Kansas City, Missouri, and spoke to Special Agent Charles Quinn.

Rodgers stated that earlier this date he had found a note on his doorstep. The note was allegedly composed of letters and words cut from newspapers and contained the statement, "We will murder the President". Rodgers said the note was signed "Ivy L. Gilmore", his estranged girlfriend. Rodgers also stated that Gilmore had run off with a "gang" and believed that she had been induced by the gang to join in an assassination plot. Rodgers inquired whether the Secret Service would investigate and attempt to locate Ivy Gilmore. Special Agent Quinn instructed Rodgers to bring the threat letter to the Kansas City Field Office later on that day, however, Rodgers failed to appear.

As a direct consequence of Rodgers' telephone call, an official Secret Service investigation was initiated on June 15, 1982. The purpose of this investigation was to determine the danger to the President posed by Ivy L. Gilmore and/or Larry Wayne Rodgers.

On June 16, 1982, Larry Wayne Rodgers, identifying himself as "Ben Johnson" telephoned the Kansas City Secret Service Office. The call was received after normal working hours and was automatically transferred to the Truman Protective Division. Rodgers told Special Agent Howard Jordan that he was the person who had spoken to Special Agent Quinn on June 15, 1982. He stated that he still had the letter signed by Ivy Gilmore, which contained a threat to kill the President, and was going to show the letter to Special Agent Quinn.

On June 17, 1982, Larry Wayne Rodgers, identifying himself as "Ben" telephoned the Kansas City Secret Service Office in an attempt to contact Special Agent Quinn. Special Agent Quinn telephoned Rodgers back, at the residence of Vickie Jackson, and Rodgers again stated that the purported threat letter existed but had been mislaid in his brother's car.

On June 18, 1982, Special Agent Quinn interviewed Debra J. Hickcox, Rodgers' sister, who advised that Ben Hunter was an alias used by Larry Wayne Rodgers and that Vickie Jackson was her co-worker and friend who had allowed Rodgers to stay at her residence. Hickcox provided

further information regarding Rodgers' background and identified Ivy L. Gilmore as Rodgers' estranged wife.

On June 18, 1982, Secret Service Special Agents James D. Moore and G. Wesley Dunlap interviewed Ivy L. Gilmore (true name Ivy Lynn Trinidad Bartley) at her residence in Phoenix, Arizona, Gilmore denied that she had been kidnapped, denied that she had run off with a gang, and denied that she had ever threatened the President in any way. She identified Larry Wayne Rodgers as her estranged husband and said she had left the Kansas City area on May 15, 1982, to get away from him.

Also, on June 22, 1982, Secret Service Special Agent G. Wesley Dunlap personally interviewed Larry Wayne Rodgers at the Phoenix Secret Service Office. After having been advised of his "Miranda" rights, and having waived these rights, Rodgers made verbal and written admissions that he had telephoned Special Agent Quinn and reported a fictitious threat against the President. He also admitted previously concocting a false kidnap plot, which was investigated by the Federal Bureau of Investigation. Rodgers said the object of these false reports was to induce the federal agencies to locate Ivy Gilmore. Rodgers further admitted that, pursuant to his scheme to involve the Secret Service, he constructed a phony letter out of cut out words which contained a threat by Ivy Gilmore to kill the President. Rodgers said he had left the note in Kevin Rodgers' car.

Continuing on June 22, 1982, Special Agents Quinn and Guerber recovered a note constructed of cut out words from Larry Wayne Rodgers' stepmother, Georgia W. Rodgers. The note contained an apparent threat against the President by Ivy Gilmore. Mrs. Rodgers said she had received this note from Marjorie F. Kroker. Mrs. Kroker said she had received it from Kevin Rodgers. Kevin Rodgers said it was the same note he had found in his car on June 18, 1982, as previously described.

CONCLUSION

This stipulation of facts is offered by the parties only for the purpose of the pretrial motion to dismiss the indictment

for failure to allege an offense, and shall be used in connection with this motion and any appeals that may arise from that motion.

Respectfully submitted.

ROBERT G. ULRICH
United States Attorney

BY:

ROBERT E. LARSEN
Assistant United States Attorney
Attorneys for Plaintiff

ALBERT MOSKOWITZ
Assistant Federal Public Defender
Attorney for Defendant

LARRY WAYNE RODGERS, *Defendant*

Supreme Court of the United States

No. 83-620

UNITED STATES, PETITIONER,

v.

LARRY WAYNE RODGERS

ORDER ALLOWING CERTIORARI. Filed December 5, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Office - Supreme Court, U.S.
FILED
NOV 29 1983
ALEXANDER L. STEVAS
CLERK

No. 83-620

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

REX E. LEE
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(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-620

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

Respondent has presented no persuasive reason why this Court should not grant the petition in this case in order to resolve the square conflict among the circuits concerning the reach of 18 U.S.C. 1001. Because many of respondent's arguments were anticipated and answered in the petition, we reply here only to his suggestion (Br. in Opp. 3-4) that Congress may act to resolve the question presented by this case. That suggestion not only is speculative, but it has been refuted by recent legislative history.

Legislation was introduced in both the 95th and 97th Congresses that would have made clear that it is a violation of the false statements statute to volunteer intentionally false information to a federal law enforcement officer. S. 1630, 97th Cong., 1st Sess. § 1343 (1981); S. 1437, 95th Cong., 1st Sess. § 1343 (1977); S. Rep. 97-307, 97th Cong., 1st Sess. 401-406 (1981); S. Rep. 95-605 (Pt. 1), 95th Cong.,

1st Sess. 370-376 (1977). Although both bills passed the Senate, neither the 95th nor the 97th Congress enacted the proposal into law.[1] No comparable legislation is currently pending before Congress.

Respondent's further suggestion (Br. in Opp. 4) that the pendency of Section 1744 of H.R. 2013, 98th Cong., 1st Sess. (1983), obviates the need for review in this case is specious. That section, entitled "False statements about emergencies," extends only to a false statement that "causes a false alarm of fire or other emergency to be transmitted to or within any organization or Government agency for dealing with emergencies involving danger to life or property." Enactment of such legislation obviously would not affect the outcome of this case, which involves the typical factual pattern in which the question presented by the petition arises.[2]

---

[1]The legislative history of both bills indicates that the Senate deemed them necessary not because it viewed current Section 1001 as not reaching the conduct at issue, but rather to correct what it perceived to be the erroneous, unduly restrictive construction placed on the statute by the Eighth Circuit. See S. Rep. 97-307, 97th Cong., 1st Sess. 401-406 (1981); S. Rep. 95-605 (Pt. 1), 95th Cong., 1st Sess. 370-376 (1977). Moreover, in both cases the proposed amendment of Section 1001 was part of a much more extensive revision of the federal criminal code. There is no indication in the legislative history that Congress's failure to enact either S. 1437, the Criminal Code Reform Act of 1977, or S. 1630, the Criminal Code Reform Act of 1981, was due to any dissatisfaction with the proposed amendment of the false statements law.

[2]There appears to be little likelihood of enactment of H.R. 2013 during the present Congress. No hearings have been held or are scheduled on the bill, and no companion legislation has been introduced in the Senate.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

NOVEMBER 1983

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Supreme Court, U.S.
FILED
NOV 22 1983
ALEXANDER L. STEVAS
CLERK

83-620

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 17, 1983

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REASONS FOR DENYING THE PETITION

I. The Issue Involved in the Present Case is Not Significant Enough to Warrant Review by this Court.

The question presented is whether 18 U.S.C. §1001 has application to a very narrow set of facts. Specifically, may an individual who knowingly volunteers false information to an investigative agency such as the Federal Bureau of Investigation or Secret Service be prosecuted under §1001?

In 1967, the Eighth Circuit, in a case styled Friedman v. United States, 374 F.2d 363 (8th Cir. 1967), decided, after an extensive review of the relevant legislative history and a careful consideration of the policy ramifications, that the term "jurisdiction" as used in the statute does not apply to a purely investigative agency such as the FBI. The Friedman Court stated:

> The F.B.I. had authority to investigate, and in that broad sense it had "jurisdiction." However, it had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry. In this restrictive sense, the investigation of a possible violation of the criminal law is not a matter over which the F.B.I. exercises "jurisdiction." It is in this more restrictive sense, we believe Congress intended to use the word "jurisdiction" in determining violations of §1001.

Id. at 368.

Since the ruling in Friedman, a period of approximately sixteen years, the Eighth Circuit has been confronted with a similar set of facts only once, the instant case, in which the Eighth Circuit reaffirmed its holding in Friedman, United States v. Rodgers, 706 F.2d 854 (8th Cir. 1983).

Moreover, in that same sixteen-year period, only two other Circuits have had occasion to consider the narrow issue presented in Friedman, the Fifth Circuit in United States v. Lambert, 501 F.2d 943 (5th Cir. 1974) (en banc), and United States v. Massey, 550 F.2d 300 (5th Cir. 1977), and the Second Circuit in United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967), the limited number of occasions with which courts have been presented with this precise issue illustrates its lack of pressing significance on a national level.[1]

Moreover, this Court has on at least one prior occasion refused to grant certiorari in a similar situation. In United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967), the Second Circuit rejected the Friedman result on nearly identical facts. The petitioner in that case, like the petitioner in the present case, sought review in this Court by noting inter alia,

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[1] There are at least two additional cases which approach but do not directly focus in on the precise question presented here. In United States v. Rose, 570 F.2d 1358 (9th Cir. 1978), the false statements were made by the defendant to a Border agent in "a routine exercise of his administrative responsibility." (Court's emphasis). Id. at 1364. The Rose Court was careful to stress that the defendant "was claiming a privilege of entry. . . ." Id. at 1364. Even under the Friedman rationale, such false statements would have been considered within the ambit of the statute, since the agent to whom the falsehoods were made had the power to "grant governmental privileges."

In United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972), the Court found that the defendant's false declaration to an FBI agent regarding his identity was not a "statement" designed to be proscribed by §1001. In dicta, the Bedore Court did briefly express an opinion that false reports of crimes may constitute an offense under §1001. However, no facts were presented to the Bedore Court which required any such ruling. Moreover, even the Bedore Court emphasized the need to read §1001 restrictively when it noted that "Extension of §1001 to its literal breadth, however, cannot be justified by its legislative history." Id. at 1110.

that the Second and Eighth Circuit cases represented a conflict in the Circuits. The Government in the Adler case filed a Brief in Opposition to the Petition urging this Court to deny certiorari and certiorari was not granted in 1967. 389 U.S. 1006 (1967). The Government now has apparently changed its mind and feels that a review is necessary. There is little that has occurred since the Adler denial, however, which would require this Court to alter its position on the matter. In fact, the paucity of relevant decisions in the Federal Court since 1967 underscores the general insignificance of the question and reinforces the correctness of this Court's earlier decision not to consider the issue.

II. Even if the Issue Presented is an Important Federal Question, Review at This Time Would be Premature.

Should this Court decide that there is a public concern significant enough to warrant a grant of certiorari, nevertheless, review at this time would be inappropriate.

Only three Circuits have as yet squarely addressed the question of whether "jurisdiction" encompasses purely investigative functions: the Second, Fifth and Eighth Circuits. As a result, no clear concensus has emerged. It would be prudent and proper to delay any final review of this question until additional Circuits have had an opportunity to consider the issue.

Moreover, the issue could resolve itself should Congress pass legislation clarifying the reach of §1001. As recently as 1981, Congress had before it proposed legislation which would have settled the question and obviated any need for review from this Court. See S. 1630

(§1343), 97th Congress, First Session (1981).[2] This proposed bill passed the Senate, but failed approval in the House of Representatives.

Presently pending before Congress is H.R. 2013, Criminal Code Revision Act of 1983. §1744 of this Act would make it a Class A misdemeanor to provide false information to any federal organization regarding an emergency situation. §1744(a). The passage of such legislation would appear to resolve some of the specific questions presented by the instant case.[3]

In view of Congress' continuing concern with the false statement law, it is not unreasonable to expect in the near future legislation which would clarify the reach of §1001. Should such legislation be adopted, any decision by this Court at this time on this issue would have minimal precedential value. The resources of this Court should be more properly applied to issues of greater general importance to the public. Moreover, it would be an appropriate exercise in judicial restraint to allow Congress additional opportunity to consider and possibly dispose of the matter rather than to hastily impose a judicial solution on what is essentially a legislative area of concern.

III. Case Law Cited by Petitioner Does Not Provide Persuasive Authority.

Petitioner's argument relies to a large extent on

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[2] Proposed §1343 specifically provided inter alia that one who makes material false oral statements to "a law enforcement officer" may violate the law. S. 1630, §1343(a)(1)(A)(i)

[3] H.R. 2013 has been referred to the Subcommittee on Criminal Justice of the House Committee on the Judiciary.

case law from the Fifth and Second Circuits. That case law cited by petitioner does not provide persuasive authority for this Court to question the result reached by the Eighth Circuit in Friedman.

Petitioner cites United States v. Massey, 550 F.2d 300 (5th Cir. 1977), and that case is factually similar to the case at bar. But the Massey Court did not base its affirmance of a §1001 conviction on an independent analysis of the statute; rather, that Court relied almost entirely on prior precedent in the Fifth Circuit, specifically on United States v. Lambert, supra. The authority of United States v. Lambert, supra, however, is considerably diminished by the vigorous dissent filed by seven Judges. Those seven Judges did not disagree with the majority's reversal of the defendant's conviction; in fact, they concurred with the result. The dissent wrote to express their strongly-held view of the importance "of preserving an open line of communication between private citizens and law enforcement agencies." United States v. Lambert, supra, at 952. The dissent recognized that such a significant national policy can only be impaired by a literal interpretation of §1001, a position which the Rodgers and Friedman Courts embraced and which should be continued to be supported by this Court.

United States v. Adler, supra, is also cited by the petitioner. The Adler decision, however, lacks persuasiveness because, unlike the Court in Friedman, no detailed analysis of the legislative history of §1001 was undertaken by the Second Circuit; nor does there seem to be in Adler the kind of careful consideration of policy

concerns so evident in the Friedman opinion. Rather, the Court in Adler relied very heavily on a 1969 Supreme Court decision, Bryson v. United States, 396 U.S. 64 (1969). The Second Circuit's reliance on Bryson, however, is misplaced, for the factual setting in Bryson differs considerably from that involved in the present case.

In Bryson, the false statement was not given to a criminal investigative agency. Rather, the N.L.R.B. was the victim of the falsehood, an agency which has the power to adjudicate rights and establish binding regulations and which, even under the Friedman and Rodgers rationale, would be subject to the protection of the statute. United States v. Rodgers, supra, at 856.

The petitioner argues that, since an investigative function of the N.L.R.B. may have been affected by the submission of the false affidavit, Bryson is in reality good authority for the proposition that Friedman and Rodgers were incorrectly decided. (Petition for a Writ of Certiorari, p. 12). The investigatory power of the N.L.R.B., however, does not comprise its sole or even primary function. That power is merely the means by which the agency can determine whether to grant further rights and remedies such as a hearing, an election and a certification thereof. 29 U.S.C. §159(c)(1). The N.L.R.B., unlike the criminal investigatory agencies, retains the power "to adjudicate rights . . . compel the action or finally dispose of the problem giving rise to the inquiry." Friedman v. United States, supra, at 368. Any investigatory function given to the N.L.R.B. is merely ancillary to its broader authority to "finally dispose of the problem." Id.

Moreover, because the N.L.R.B. is not an investigatory body similar to the FBI or Secret Service, the broad social policy protected by the Friedman and Rodgers rulings was not a factor that this Court had occasion to weigh in Bryson. The crucial distinctions between Friedman and Bryson were noted by this Court when it expressly refused to "either . . . approve or disapprove Friedman's holding." Bryson v. United States, supra, at 71, n. 10. Petitioner's attempts to minimize those differences directly contradict this Court's express recognition of them.

IV. Friedman and Rodgers are Well Considered and Should Not be Reviewed or Overturned.

Unlike several of the decisions cited by the Government, the Eighth Circuit in Friedman undertook a rather detailed review of the legislative history of §1001 in the belief that where questions of statutory construction are concerned, the legislative history and purpose of the statute are highly significant. Friedman v. United States, supra, at 366. On the basis of that review, the Eighth Circuit found that the central purpose of §1001 was to curtail the flow of false information to various federal agencies created to deal with the economic collapse of the depression. Id. This counsel has not found, nor has the Government cited, any new or additional information tending to alter the conclusion reached by the Eighth Circuit in Friedman that false statements to criminal investigative agencies were simply not envisioned by Congress when it passed the present legislation.

It is true, of course, that Congress did not expressly prohibit the extension of §1001 to criminal investigative agencies. But, as the Eighth Circuit noted,

it is a well-recognized rule of statutory construction "'[t]o construe statute so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose. . . .'" Friedman v. United States, supra, at 366. The Friedman Court correctly stated that a "literal application of this statute can reach patently absurd results." Id. at 366.

For example, a broad interpretation of §1001 would make it a more severely punished crime to be untruthful to an agent of the Federal Bureau of Investigation during an investigation than to lie under oath before a court of law.[4] Id. Moreover, under a literal application of the statute, "anything more than a casual social conversation with a government employee would, without warning, subject the speaker to the possibility of severe punishment." Friedman v. United States, supra, at 366. As the Friedman Court noted,

> This is a formidable, indeed a dangerous, power the Government assumes the statute invests in law enforcement officials. We cannot blithely assume that Congress granted such a sweeping power. It is our position that such a formidable police authority must be clearly authorized. It will not be assumed to exist. If the Congress wanted unsworn statements to investi-

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[4] An interesting discussion of the harshness of the statute can be found in United States v. Moore, 185 F.2d 92 (5th Cir. 1950). In that case, the Court refused to apply the statute to a specific situation, noting that:

> Under familiar canons of construction a penal act of the harshness and rigor of this one,—a harshness and rigor so great that, as the revisers point out in the notes to the Code as amended in 1948, the punishment was deliberately reduced from ten to five years—the statute will not be stretched beyond, it will be strictly confined within, the fair meaning of its terms.

Id. at 95.

> gative officials to serve as the basis for severe criminal punishment, we think it would have said so in clear, direct and positive terms.

Id. at 366-7.

Finally, the Eighth Circuit was concerned that a "strict application of this statute would remove a time-honored and now necessary formality of requiring witnesses to testify under oath." Friedman v. United States, supra, at 367. Nothing has occurred in the intervening years since the Eighth Circuit decided Friedman to alleviate that concern. Today, as then, one "simply cannot believe that Congress intended to supplant the existing perjury statutes and destroy the protections they afford."[5] Id. at 367. Indeed, the rationale for a restrictive reading of §1001 has, if anything, become more compelling with the passage of time. Subsequent to the Friedman case, this Court has increased the safeguards provided by the perjury law. In Bronston v. United States, 409 U.S. 352 (1972), this Court restricted the scope of the perjury statute by holding that an incomplete, misleading or deceptive statement, if literally true, does not constitute perjury. If such a limitation is not applicable in a §1001 context, then a broad reading of that statute would invite avoidance of the requirements announced by this Court in Bronston.[6] As a result, to adopt

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5 One safeguard provided an accused under the existing perjury law but not under §1001 is the two-witness rule which bars conviction for perjury on the uncorroborated testimony of a single witness. See Weiler v. United States, 323 U.S. 606 (1944).

6 If, on the other hand, the Bronston ruling is applicable in a §1001 context, then other problems arise. For a discussion, see Infra pp. 13-14.

at this time the new overexpansive view of §1001 suggested by the petitioner is, as the Eighth Circuit stated in Friedman, to bring "about absurd consequences . . . not intended by Congress." Id. at 367, quoting Sorrells v. United States, 287 U.S. 435, 446 (1932).

Nor did the Eighth Circuit take a unique position in holding that §1001 "must have some effective limits." Friedman v. United States, supra, at 367. Federal Courts have repeatedly refused to apply the statute in a literal manner. For example, despite the apparently all-inclusive wording of the statute, at least one court has refused to apply §1001 to the introduction of false documents in a criminal proceeding. United States v. Erhardt, 381 F.2d 173 (6th Cir. 1967). Another court has found the prohibitions of §1001 inapplicable to preliminary inquiries by an agency to determine jurisdiction under the Fair Labor Standards Act. United States v. Moore, 185 F.2d 92 (5th Cir. 1950). A third court held that false statements to a grand jury are not false statements within the meaning of the statute. United States v. Allen, 193 F.Supp. 954 (1961). The Eighth Circuit has refused to extend coverage of the law to false statements on loan applications, even though some governmental involvement may be present. Terry v. United States, 131 F.2d 40 (8th Cir. 1942). False statements in a civil suit in Federal Court were held by the Second Circuit not to be within the ambit of the statute. United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974). And several courts have ruled that a suspect in a criminal investigation may not be charged with the violation of §1001 simply because he falsely denies incriminating information, the so-called

"exculpatory-no" doctrine. See United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976), and cases cited therein at 183, n. 9 and 10.

While the specific rationale for refusing to extend coverage of this statute in a particular factual setting may not always be clear or consistent, it is certain that judicial restraint in applying the false statement prohibition has been common. The Eighth Circuit position falls squarely within this tradition of restraint.

Unlike many of the cases cited above, however, the Eighth Circuit did more than merely refuse to apply the statute to a specific situation. The Eighth Circuit established a clear and rational dividing line and so managed to define the proper limits of the law in a way which could provide guidance for the future. Friedman v. United States, supra, at 367-9. That rule was based on a proper interpretation of the phrase "within the jurisdiction" and was "made in the light of the legislative intent as it has been disclosed in the acts of Congress." Terry v. United States, supra. To withdraw that precedent or to distinguish the rule into oblivion would be to take away the consistent guidance offered by Friedman.

In addition, the Friedman rule serves a useful social function. It promotes "the important social policy that is served by an open line of communication between the general public and law enforcement agencies." Friedman v. United States, supra, at 369. The fear is not that otherwise innocent persons may be convicted under §1001, but that the mere possibility of prosecution will exercise a chilling effect on the public's interaction with

law enforcement agencies. The irony of the petitioner's position for a wide-open interpretation of §1001 is that such a view of the statute may result, not in the overall deterrence of criminal activity, but in its encouragement; for with an unfettered reading of the statute, information that could lead to arrests may be increasingly difficult to obtain. The Eighth Circuit, in promulgating a general rule of exclusion, understood the dangers of inhibiting voluntary disclosures. Those risks remain and need to be guarded against today no less than when the Friedman Court rendered its decision.

The rule announced in Friedman is significant as well in its ability to harmonize difficult legal and factual problems. The "exculpatory-denial" situation is a good example. Under a literal interpretation of the statute, such a false denial is clearly subject to prosecution. While many courts have allowed for the exception, the rationale and exact scope of the exception are not always made clear. Paternostro v. United States, 311 F.2d 298 (5th Cir. 1982). Certainly, there is a logical inconsistency in excluding a denial but punishing other kinds of statements. After all, a "denial" may be no less false or misleading than any other kind of statement. Moreover, there is often a factual problem in deciding when a statement constitutes a negative "denial" or a positive "statement". United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972); United States v. Bush, 503 F.2d 813 (5th Cir. 1974). Under the Friedman rule, however, there is no difficulty in reconciling the language of the statute with the "exculpatory-no" doctrine, since virtually any statement to an investigative agency falls out-

side the scope of the statute.

The Friedman rule makes sense in another context as well. Until recently, there has been little question that a statement, if contemplated by the act, may be either written or oral. United States v. Beacon Brass Co., 344 U.S. 43, 46 (1952). However, this Court in Bronston v. United States, 409 U.S. 352 (1973), has limited the scope of the perjury statute by ruling that misleading statements which are technically true do not constitute a violation of that law. This ruling has reopened the question of whether oral as well as written statements are "statements" for purposes of §1001. If a Bronston defense is available to defendants charged under §1001, then that defense is not truly available unless the statement in question is in writing; for, where the statement is not in writing, the defendant may be faced with a difficult, if not impossible, task of "arguing that his statements . . . were literally true on the sole basis of the agent's sketchy notes. . . ." United States v. Ehrlichman, 379 F.Supp. 291, 292 (D.C. Cir. 1974). In United States v. Poutre, 646 F.2d 685 (1st Cir. 1980), the Court seriously considered the need for written testimony as a foundation for a §1001 charge, since "what is actually said by a defendant becomes a critically important part of any prosecution under §1001." Id. at 688.[7] See also United States v. Ehrlichman, supra, and United States v. Clifford, 426 F.Supp. 696 (E.D. N.Y. 1976). Under Friedman, however, the Bronston problem, at least in the context of statements to investigative agencies, is rendered moot, since such statements, whether

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[7] The Poutre Court stopped short of making a blanket ruling that false statements charged under §1001 must be in writing.

oral or written, are not cognizable under the statute.

CONCLUSION

For any and all of the reasons cited above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ORIGINAL

83-620

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW respondent, LARRY WAYNE RODGERS, by his attorneys, Raymond C. Conrad, Jr., Federal Public Defender, Western District of Missouri, and Albert N. Moskowitz, Assistant Federal Public Defender, Western District of Missouri, and moves this Court, pursuant to 28 U.S.C.A. §1915, 18 U.S.C.A. §3006A(d)(6) and Rules 46.1 and .2, U.S. Sup. Ct. R., for leave to file a Brief in Opposition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without prepayment of docket or other fees, and to proceed in forma pauperis. The Brief accompanies this Motion.

On September 2, 1982, respondent was charged in a two-count Indictment returned to the United States District Court, Western District of Missouri, Western Division, with violations of 18 U.S.C. §1001. Following his arrest, the respondent submitted an Affidavit of Financial Status to the District Court. Based upon that Affidavit, the United States Magistrate, pursuant to 28 U.S.C. §636(a)(1) and (2), 636(b)(4), Rules 26.I.A.1. and 2., and 26.XI.B., U.S. Dist. Ct. R., W.D.-Mo., permitted him to proceed in forma pauperis, in accordance with 28 U.S.C. §1915(a) and (c), and appointed undersigned counsel to represent respondent, in accordance with 28 U.S.C. §1915(d), 18 U.S.C. §3006A(a), (b) and (c), and Rules 44 and 5(c), Fed. R. Crim. P. The District Court subsequently dismissed both counts against the respondent.

An appeal was taken by the Government to the United States Court of Appeals for the Eighth Circuit. By Order filed December 13, 1982, that Court, pursuant to 28 U.S.C. § 1915(a), (b) and (c), 18 U.S.C. §3006A(d)(6), and Rule 24 (a) ¶2, Fed. R. App. P., authorized him to proceed in forma pauperis. It also re-appointed the undersigned to represent respondent on appeal, in accordance with 28 U.S.C. §1915(c) and (d), 18 U.S.C. §3006A(c), Rule 47, Fed. R. App. P., and its Plan to Implement the Criminal Justice Act of 1964, Introduction (1) and Section II(1). U.S. Ct. App. R., 8th Cir.

Because both the United States District Court, Western District of Missouri, and the United States Court of Appeals for the Eighth Circuit permitted respondent to proceed in forma pauperis and appointed counsel for him, no affidavit in support of his Motion to Proceed in

Forma Pauperis in this Court is required. 18 U.S.C. §3006A(d)(6); Rule 46.1, U.S. Sup. Ct. R.

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CERTIFICATE OF SERVICE OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND OF BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CERTIFICATE OF SERVICE OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND OF BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In accordance with Rules 42.3, 19.3, 46.4, 28.3, 28.4.(a), 28.5 and 28.5.(b) of the United States Supreme Court Rules, I hereby certify that one copy of the accompanying Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was mailed, with prepaid first-class postage affixed, to the Honorable Rex Lee, Solicitor General of the United States, U. S. Department of Justice, Washington, D.C., 20530, Counsel for Petitioner, and one copy of each was hand delivered to Cynthia Clark-Campbell, Assistant U.S. Attorney, Western District of Missouri, 549 U.S.

Court House, 811 Grand Avenue, Kansas City, Missouri, 64106, Counsel for Petitioner, this 17th day of November, 1983. I further certify that all parties required to be served have been served.

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No. 83-620

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether intentionally false, volunteered statements made to federal law enforcement officers relate to matters "within the jurisdiction of any department or agency of the United States," within the meaning of 18 U.S.C. 1001.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-620

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 706 F.2d 854. The order of the district court dismissing the indictment (Pet. App. 5a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983 (Pet. App. 7a). A petition for rehearing was denied on July 25, 1983 (Pet. App. 8a). On September 14, 1983, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including October 23, 1983. The petition was

filed on October 13, 1983, and was granted on December 5, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 2, 1982, a grand jury sitting in the Western District of Missouri returned a two-count indictment charging respondent with making false, fictitious and fraudulent statements and representations to the Federal Bureau of Investigation and the United States Secret Service, in violation of 18 U.S.C. 1001 (J.A. 4-5). Respondent moved to dismiss the indictment for failure to state an offense, and the district court granted his motion (Pet. App. 5a-6a). The court of appeals affirmed (Pet. App. 1a-4a).

1. The facts underlying the indictment, as set forth in the court of appeals' opinion (Pet. App. 2a), show that respondent telephoned the Kansas City, Missouri, office of the FBI on June 2, 1982, and reported that his wife had been kidnapped. The FBI spent more than 100 agent-hours investigating the alleged kid-

napping; as a result, it determined that no kidnapping had occurred and that respondent's wife had left him voluntarily.

On June 15, 1982, respondent contacted the Kansas City office of the Secret Service and reported that his "estranged girlfriend" (actually his wife) had joined in a plot to assassinate the President. The Secret Service spent more than 150 hours of agent and clerical time investigating this threat and eventually located respondent's wife in Arizona. She stated that she had left the Kansas City area in order to get away from respondent. Respondent subsequently confessed that he had made these false reports in order to induce the federal agencies to locate his wife.

2. The district court granted respondent's motion to dismiss the indictment, relying on the Eighth Circuit's holding in *Friedman* v. *United States*, 374 F.2d 363 (1967), that the investigation of a possible criminal violation is not a matter over which the FBI exercises "jurisdiction" in the sense that the term is used in 18 U.S.C. 1001 (Pet. App. 5a-6a).

The court of appeals affirmed, adhering to its reasoning in *Friedman* and finding that the same analysis applies to statements made to the Secret Service (Pet. App. 3a). The court acknowledged that two other courts of appeals had reached a contrary conclusion on similar facts (*ibid.*), but it found its own prior analysis and reasoning "more persuasive" (*id.* at 3a-4a).

SUMMARY OF ARGUMENT

The question presented by this case is whether false crime reports made to the FBI and Secret Service relate to matters "within the jurisdiction of any department or agency of the United States," within the meaning of 18 U.S.C. 1001. The Eighth Circuit has

held that they do not, on the ground that the word "jurisdiction," as used in Section 1001, refers only to "the power to make final or binding determinations," not to "the mere authority to conduct an investigation" (*Friedman* v. *United States*, 374 F.2d 363, 367 (1967)). Two other courts of appeals have rejected the Eighth Circuit's restrictive construction of the statute, and we submit that this Court should also.

A.

1. On its face, Section 1001 plainly embraces false crime reports made to law enforcement agencies. The statute's proscription is written in broad, sweeping terms, and the Eighth Circuit's cramped construction of the word "jurisdiction" is inconsistent with that generous phraseology.

Moreover, the ordinary meaning of the word "jurisdiction" is not the specialized definition that the Eighth Circuit arbitrarily assigned to it, but refers simply to the "power or right to exercise authority" in a particular situation. Because the FBI has authority to "detect and prosecute crimes against the United States" (28 U.S.C. 533(1)), including kidnapping, and because the Secret Service is authorized "to protect the person of the President" (18 U.S.C. 3056), those agencies plainly had "jurisdiction" over respondent's false reports that his wife had been kidnapped and his "estranged girlfriend" had joined a plot to assassinate the President.

In addition, it is beyond dispute that the FBI and Secret Service are "department[s] or agenc[ies] of the United States" within the meaning of 18 U.S.C. 1001. It is most unlikely, in our view, that Congress, having written Section 1001 to cover broadly "any department or agency of the United States," would

have intended, simply by the use of the word "jurisdiction," to remove such important government agencies as the FBI and the Secret Service from the protection of the statute.

2. In *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941), the Court described the purpose of Section 1001 as being "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." As the Court recognized, the "within the jurisdiction" language was not intended to distinguish between different types of agencies or administrative functions, but only to differentiate between matters peripheral to the business of the department or agency involved and the official, authorized functions of that body. On both subsequent occasions the Court has had to address the scope of Section 1001, it also has indicated that the statute should be broadly construed. The restrictive definition the Eighth Circuit assigned to the word "jurisdiction" in Section 1001 is entirely at odds with this Court's consistently expansive interpretation of the statute.

B.

The Eighth Circuit erred in restricting application of the all-inclusive language of the statute to the specific circumstances that provided the initial impetus for the 1934 amendment to the false statement statute that inserted the crucial "matter within the jurisdiction" language. To be sure, an immediate motivation underlying the 1934 revision was to make criminal the giving of false information to certain newly-created regulatory agencies. But nothing in the relevant legislative history suggests that protecting the regulatory agencies from false information was the exclusive purpose of the statute.

Moreover, when in prior versions of the false statement statute Congress intended to restrict the reach of the statute to false statements made for particular purposes, it enumerated those purposes expressly. The fact that Congress deleted any requirement of purpose in 1934 is strong evidence that it did not intend the statute to apply only to false statements made for the particular purposes identified by the Eighth Circuit—to obtain a monetary award or governmental privilege or to affect an administrative determination.

In addition, in a predecessor bill to the 1934 amendment, Congress deliberately substituted the words "any department or agency" of the United States for a limited list of enumerated agencies with whose protection the sponsor of the legislation was immediately concerned. In our view, this is further proof that Congress did not intend application of the broadly worded statute to be restricted to the particular circumstances that provided the initial motivation underlying the legislation.

C.

None of the *Friedman* court's additional objections to the literal construction of Section 1001 warrants departure from the plain meaning of the language employed by Congress. The fact that the penalty provided for a violation of Section 1001 exceeds the penalty provided under the general perjury statute, 18 U.S.C. 1621, is no reason for distinguishing between false statements made to investigative agencies and false statements made to regulatory agencies, since neither category of statements is inherently more serious or more blameworthy than the other.

Nor would the plain meaning construction of Section 1001 "render useless" "[t]he numerous statutes

authorizing investigative agencies to administer oaths" (374 F.2d at 367). Except in particular circumstances not applicable here, FBI and Secret Service agents are not authorized to administer oaths. Furthermore, the court of appeals erred in assuming that if Section 1001 applies to false crime reports made to the FBI and Secret Service it must also reach false statements made under oath during judicial proceedings.

Moreover, there is no substantial danger that a construction of Section 1001 that covers false crime reports would deter individuals from conveying information that they believed to be truthful to the FBI or other law enforcement agencies.

Finally, the conduct at issue here is deserving of criminal sanction. The plain language of Section 1001 covers such conduct, and the Eighth Circuit has offered no persuasive reason why that language should not be afforded its full scope.

ARGUMENT

INTENTIONALLY FALSE, VOLUNTEERED STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS RELATE TO MATTERS "WITHIN THE JURISDICTION" OF A "DEPARTMENT OR AGENCY OF THE UNITED STATES" WITHIN THE MEANING OF 18 U.S.C. 1001

In *Friedman* v. *United States*, 374 F.2d 363 (1967), on which the courts below relied in dismissing the indictment against respondent, a divided panel of the Eighth Circuit held that a conviction under 18 U.S.C. 1001 could not be predicated on the defendant's false, volunteered complaint to the FBI of his alleged mistreatment by state police officers, which the defendant claimed violated his civil rights. The court based its

ruling on the conclusion (374 F.2d at 365-366) "that the 'jurisdiction' of the F.B.I. to investigate crimes against the United States is not the 'jurisdiction' envisioned by § 1001."

Although the *Friedman* court acknowledged (374 F.2d at 366-368) that the application of 18 U.S.C. 1001 to the facts before it would be consistent with the literal language of the statute, it held that such an application would not comport with the "context * * * envisioned by the drafters" (*id.* at 366). The court relied heavily on the fact that the critical language—"in any matter within the jurisdiction of any department or agency of the United States"—was inserted in 1934, as "the government, at an accelerated pace, began entering the field of economic reform and regulation" (*ibid.*). According to the court of appeals (*ibid.*), "the immediate and primary purpose in amending the * * * statute was to curtail the flow of false information to the newly created regulative agencies." Reasoning from that premise the court concluded (*ibid.*):

> Though the statute was drafted in broad inclusive terms, presumably due to the numerous agencies and the wide variety of information needed, there is nothing to indicate that Congress intended this statute to have application substantially beyond the purposes for which it was created.

The court implemented its conclusion by distinguishing (*id.* at 367) between the power "to make monetary awards, grant governmental privileges, or promulgate binding administrative and regulative determinations," and "the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action." Accord-

ing to the Eighth Circuit (*id.* at 368), Congress used the word "jurisdiction" in Section 1001 in only the former, more restrictive sense.

The court of appeals bolstered its decision by referring to 18 U.S.C. 1621, which prescribes a lesser maximum penalty than does Section 1001, and observing that Congress could not have "considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before a court of law." 374 F.2d at 366 & n.1. The court further opined (*id.* at 367) that "a literal application of the statute would completely remove the necessity for taking oaths." Finally, the court apparently was strongly influenced by its fear that adoption of the government's position would inhibit citizens from reporting suspected crimes to the police. *Id.* at 369.

Since 1967, two other courts of appeals have rendered decisions directly in conflict with *Friedman*, and no other court of appeals has indicated agreement with the Eighth Circuit's view. In *United States* v. *Adler*, 380 F.2d 917, cert. denied, 389 U.S. 1006 (1967), decided only four months after *Friedman*, the Second Circuit rejected both the reasoning and the result of that decision, concluding (*id.* at 922) that "the word 'jurisdiction' as used in the statute must mean simply the power to act upon information when it is received." On that basis, the court upheld the conviction under Section 1001 of the president of a construction company who falsely reported to an FBI agent that he had been forced to pay bribes to government officials in the course of completing a construction contract at a government installation.

Similarly, in *United States* v. *Lambert*, 501 F.2d 943, 945-946 (1974), the en banc Fifth Circuit ex-

pressly stated its preference for the Second Circuit's approach in *Adler* over the Eighth Circuit's in *Friedman*.[1] Deeming itself "bound * * * [by this Court's decisions] to give [the "matter within the jurisdiction"] language a broad, nontechnical meaning," the court concluded that a statement "falsely pointing to possible criminal conduct that is within the power of the FBI to investigate * * * is a 'matter within [FBI] jurisdiction' under § 1001" (501 F.2d at 946; footnote omitted). See also *United States* v. *Massey*, 550 F.2d 300, 305 (5th Cir. 1977).

As we show below, the Second and Fifth Circuits were correct in concluding that Section 1001 applies to intentionally false statements volunteered to law enforcement agencies.[2] On its face, the language of

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[1] A panel of the Fifth Circuit initially had reversed the conviction in *Lambert*, adopting the reasoning of *Friedman* v. *United States*, *supra*. On the court of appeals' own motion, it granted rehearing and vacated the opinion of the panel. The court nevertheless reversed the conviction on the alternative ground that there was a fatal variance between the indictment and the proof. 501 F.2d at 946.

[2] Because this case is limited to false statements that are volunteered to law enforcement agencies, it does not raise the question presented by the so-called "exculpatory no" cases, in which the alleged violation of Section 1001 arises out of the defendant's negative response to a law enforcement officer's inquiry into his involvement in a crime. See *United States* v. *Chevoor*, 526 F.2d 178, 182-184 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976) (Section 1001 inapplicable to "exculpatory no" situation); *United States* v. *Bush*, 503 F.2d 813, 818-819 (5th Cir. 1974) (same); *United States* v. *Bedore*, 455 F.2d 1109, 1110-1111 (9th Cir. 1972) (same); *Paternostro* v. *United States*, 311 F.2d 298, 305, 309 (5th Cir. 1962) (same). But see *United States* v. *Goldfine*, 538 F.2d 815, 821 (9th Cir. 1976) (Section 1001 applicable to false responses given to DEA agents); *United States* v. *Ratner*, 464 F.2d 101,

the statute covers such conduct, and nothing in the legislative history suggests that Congress intended anything other than the plain meaning of the language it employed. Nor do the additional arguments advanced by the Eighth Circuit or relevant policy considerations warrant departure from the plain language of the statute.

A. The Plain Language of Section 1001 Reaches False Crime Reports Voluntarily Made to Law Enforcement Agencies

1. As this Court has frequently noted:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

Russello v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4 (quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citation omitted)). See also *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7; *Consumer Product Safety*

102-105 (9th Cir. 1972) (Section 1001 applicable to false responses given to IRS agents). Those courts that have declined to apply Section 1001 to the "exculpatory no" situation generally have done so on the ground that a negative response to an inquiry by a law enforcement officer is not a "statement" within the meaning of Section 1001. See *United States* v. *Chevoor*, 526 F.2d at 182, 184; *United States* v. *Bedore*, 455 F.2d at 1110; *Paternostro* v. *United States*, 311 F.2d at 300-305. As a matter of prosecutive policy, the Department of Justice does not charge false denials of criminal activity by suspects to federal law enforcement agencies as violations of Section 1001. See Memorandum for the United States at 8-9 in *Nunley* v. *United States*, 434 U.S. 962 (1977); see also *United States Attorneys' Manual* tit. 9, ch. 42, at 15-17 (Jan. 17, 1977).

Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language of Section 1001 plainly encompasses false crime reports voluntarily made to the FBI and the Secret Service.

Section 1001 makes it a crime "in *any* matter within the jurisdiction of *any* department or agency of the United States knowingly and willfully [to] * * * make[] *any* false, fictitious or fraudulent statements or representations" (emphasis added). The statute's proscription is clearly worded and written in broad, sweeping terms. See *United States* v. *Bramblett*, 348 U.S. 503, 508 (1955); *United States* v. *Gilliland*, 312 U.S. 86, 91 (1941). As the Second Circuit observed in *Adler*, 380 F.2d at 922, the Eighth Circuit's "restrictive interpretation of the word 'jurisdiction' as used in § 1001 cannot be reconciled with the broad interpretation applied to other terms in the statute." See also *Russello* v. *United States*, slip op. 5 ("Congress selected this general term apparently because it was fully consistent with the pattern of the * * * statute in utilizing terms and concepts of breadth").

Moreover, because the word "jurisdiction" is not specifically defined in Section 1001, we " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello*, slip op. 4 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). See also *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5. In its ordinary sense, the word "jurisdiction" denotes simply the "power or right to exercise authority" in a particular situation. See *Webster's Third New International Dictionary* 1227 (1976).[8] 28 U.S.C. 533

[8] Although the first sense of "jurisdiction" listed in *Webster's* is "the legal power, right, or authority to hear and determine a cause considered either in general or with refer-

(1) expressly authorizes the Justice Department and the FBI "to detect and prosecute crimes against the United States," of which kidnapping undisputably is one (see 18 U.S.C. 1201). Likewise, 18 U.S.C. 3056 empowers the Secret Service "to protect the person of the President." These agencies thus plainly had "jurisdiction" with respect to the subject matter of respondent's false reports that his wife had been kidnapped and that his "estranged girlfriend" had joined a plot to assassinate the President.

Indeed, the Eighth Circuit acknowledged that the application of Section 1001 to false reports of crime made to the FBI would be consistent with a "literal interpretation" of the statute (*Friedman*, 374 F.2d at 366), and that the word "jurisdiction" in its "broad sense" encompasses the FBI's "authority to investigate" (*id.* at 368). Eschewing the plain language of the statute, however, that court narrowly defined "jurisdiction" for purposes of Section 1001 as "the power to make final or binding determinations," *i.e.*, the "power to make monetary awards, grant governmental privileges, or promulgate binding administrative and regulative determinations" (*id.* at 367). The court excluded from the definition of "jurisdiction" in Section 1001 "the mere authority to conduct an investigation in a given area without

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ence to a particular matter: legal power to interpret and administer the law in the premises" (*Webster's* at 1227), the explanatory notes to the dictionary (*id.* at 17a) make clear that the order of the senses is purely historical. The later sense thus expresses the more ordinary usage today, while the former would block application of the statute in many circumstances, such as the making of payments under federal contracts, in which its applicability is well settled and undisputed.

the power to dispose of the problems or compel action" (*ibid.*). There is no basis for the Eighth Circuit's cramped construction of the statute.

To be sure, the word "jurisdiction" is susceptible to more than one meaning. In its most technical sense, for example, it denotes the power of a court to decide cases. *Black's Law Dictionary* 991 (rev. 4th ed. 1968). But Congress clearly did not have this limited meaning in mind when it enacted Section 1001. See *Ogden* v. *United States*, 303 F.2d 724, 743 n.73 (9th Cir. 1962) ("[t]he term 'jurisdiction' is not used in the Act in a technical sense"). Moreover, so far as we can determine, no standard dictionary has defined "jurisdiction," as did the court in *Friedman*, to refer *solely* to the regulatory or administrative authority of the departments and agencies of the government.[4] While it surely is true that

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[4] The only authority cited by the *Friedman* court (374 F.2d at 367) in support of its narrow construction of the word "jurisdiction" is *Gonzales* v. *United States*, 286 F.2d 118 (10th Cir. 1960). That case, however, does not bear the heavy reliance the Eighth Circuit has placed on it.

In the first place, the court in *Gonzales* was not concerned with any purported distinction between investigative and regulatory jurisdiction. The agency involved in that case, the Rural Electrification Administration, was clearly of the regulatory sort: the only issue was whether it had "jurisdiction" over information that it had no authority to require the defendant to provide.

Moreover, although, in our view, the investigative and prosecutorial authority vested in the FBI, Department of Justice and Secret Service satisfies the " 'right to say and the power to act' " criterion, 374 F.2d at 367, we further note that, in relying on this particular aspect of "jurisdiction," the *Friedman* court quoted only a portion of the definition set forth in *Gonzales*, 286 F.2d at 123 (quoting *Carroll Vocational*

making monetary awards, granting governmental privileges and promulgating administrative and regulative determinations are "matters within the jurisdiction" of the regulatory agencies, they are no more so than investigating reports of federal crime is a "matter within the jurisdiction" of the FBI or than investigating reports of plots to assassinate the President is a "matter within the jurisdiction" of the Secret Service. Had Congress intended the restrictive, highly specialized meaning of "jurisdiction" assigned to the word by the Eighth Circuit, "its purpose could readily have been accomplished by inserting an appropriate descriptive or limiting clause." *Friedman*, 374 F.2d at 375 (dissenting opinion).

Furthermore, the distinction drawn by the Eighth Circuit between the investigative authority of the FBI (and the Secret Service) and the administrative authority exercised by the regulatory agencies—which the *Friedman* court described (374 F.2d at 367) as "the fundamental difference between the naked authority of a body to act and the power to make final or binding determinations"—is not nearly so clearcut as the court portrayed it. As a result of an investiga-

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Institute v. *United States*, 211 F.2d 539, 540 (5th Cir. 1954) (emphasis added)):

> "Jurisdiction means the right to say and the power to act; *and, as between agencies of the government, jurisdiction is the power of that particular agency to administer and enforce the law.*"

Since the FBI, the Justice Department, and the Secret Service are charged by law with, respectively, the detection and prosecution of crimes against the United States and the protection of the President, they clearly are "administer[ing] and enforc[ing] the law," and thus exercising "jurisdiction" within the intendment of *Gonzales*, when they investigate false reports of crime like those made by respondent.

tion by the FBI, the Department of Justice may decide not to institute prosecution. Such a determination, not being subject to judicial review, surely qualifies as one that is "final or binding." By contrast, administrative action generally is subject to judicial review (see 5 U.S.C. 702 *et seq.*). In this sense, it is the regulatory agencies that lack "the power to dispose of the problems or compel action" (374 F.2d at 367). There thus is no principled basis for the distinction among types of "jurisdiction" that the Eighth Circuit has attempted to draw.

Moreover, it is beyond dispute that the FBI and the Secret Service are "department[s] or agenc[ies] of the United States" within the meaning of Section 1001. See 374 F.2d at 365; *United States* v. *Stark*, 131 F. Supp. 190, 194 (D. Md. 1955); see also 18 U.S.C. 6. Yet, if the Eighth Circuit's view were the correct one—if "the investigation of a possible violation of the criminal law is not a matter over which the FBI exercises 'jurisdiction' " (374 F.2d at 368)—agencies such as the FBI and the Secret Service would not be covered by the statute. Like Judge Register, who dissented in *Friedman*, 374 F.2d at 375, we find it altogether unlikely that, having broadly drawn Section 1001 to apply to "any department or agency of the United States," Congress would have expressed its intention to exclude the FBI and other investigative agencies from the coverage of the statute by the simple, unadorned use of the word "jurisdiction": "I [cannot] believe that, in this manner, Congress intentionally excepted, for all practical purposes, such an important governmental agency from the plain meaning of 'any department or agency.' " As the Second Circuit observed in *United States* v. *Adler*, 380 F.2d at 922, "[t]here is nothing

to suggest, either in the legislative history or in the cases, that Congress in enacting § 1001 intended to conserve the energies of only certain agencies." See also *United States* v. *McCue*, 301 F.2d 452, 454-455 (2d Cir. 1962).

2. The unnaturally restrictive construction placed on the word "jurisdiction" in Section 1001 by the Eighth Circuit is also inconsistent with the generally expansive interpretation this Court has given the statute. See generally Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 Colum. L. Rev. 316, 318 (1977).

The Court has had three occasions to address the scope of Section 1001; in all three the Court rejected proposed narrowing constructions of the statute.[5] In the first case, *United States* v. *Gilliland*, 312 U.S. 86 (1941), the Court rejected the contention that, notwithstanding the substitution in 1934 of the phrase "in any matter within the jurisdiction of any department or agency of the United States" for the phrase "for the purpose and with the intent of * * * defrauding the Government of the United States" (Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015), the statute should continue to be restricted to cases involving pecuniary or property loss to the government.[6] At

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[5] Another case involving the scope of 18 U.S.C. 1001 is currently pending before the Court. *United States* v. *Yermian*, cert. granted, No. 83-346 (Nov. 28, 1983). *Yermian* presents the question whether, in a prosecution under Section 1001 for making a false statement, the government must prove that the defendant knew that the statement was made "in [a] matter within the jurisdiction of [a] department or agency of the United States."

[6] In *United States* v. *Cohn*, 270 U.S. 339, 346-347 (1926), the Court had construed the word "defrauding" in 40 Stat. 1015 "in the manner in which those words are ordinarily

the outset, the Court noted (312 U.S. at 91) "the broad language of the statutory provision here involved." Moreover, the Court explained (*id.* at 93), the purpose of the statute is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction."

It would be entirely at odds with this broad statutory purpose to construe the term "jurisdiction" as referring only to rule-making or adjudicative power rather than to authority or power in general. The *Gilliland* Court did not single out certain types of governmental functions as covered by the statute, but referred generally to the "*authorized* functions of governmental departments and agencies" (312 U.S. at 93; emphasis added). As the Court thus indicated, the "within the jurisdiction" phrase was not meant to distinguish between different types of agencies or different official functions of a particular agency, but was intended only to differentiate between matters outside of or peripheral to the business of the department or agency involved and matters constituting the official, authorized functions of that body. This Court noted in *Gilliland*, 312 U.S. at 93, that it is the perversion and disruption of these "authorized functions" with which the statute is concerned.

As we showed above (pages 12-13, *supra*), investigating reports of crime and investigating reports of plots to kill the President are among the quintessential functions of the FBI and Secret Service. Here,

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used, as relating to the fraudulent causing of pecuniary or property loss."

the false charges made by respondent predictably set those functions into motion, causing the time and energies of several agents and other employees to be diverted from other, bona fide investigations to aid in the search for respondent's estranged wife. In short, respondent, for his own purposes, willfully perverted the agencies' authorized function of investigating criminal activity.

The phrase "within the jurisdiction of any department or agency of the United States" also was construed broadly in *United States* v. *Bramblett*, 348 U.S. 503 (1955). There, the Court upheld the conviction under Section 1001 of a former member of Congress for having falsely represented to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his official clerk. Noting (*id.* at 508) the "broad scope" of the statute, the Court rejected the defendant's contention that only an executive agency could constitute a department or agency of the United States within the meaning of 18 U.S.C. 1001. The Court observed (348 U.S. at 507-509 (footnotes omitted)):

> There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted. There was certainly no suggestion that the new phrase ["in any matter within the jurisdiction, of any department or agency of the United States"] was to be interpreted so that only falsifications made to executive agencies would be reached. Apparently the * * * phrase was inserted simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached.
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> * * * * * *

> The context in which this language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments.

Although the specific concern of the Court in *Bramblett* was whether legislative and judicial, as well as executive, agencies were "department[s] or agenc[ies]" within the meaning of 18 U.S.C. 1001, the Court's broad construction of the statute strongly suggests that *all* governmental agencies, regardless of the *nature* of the function they are authorized to perform, are covered by the statute. The holding of the court below, that agencies endowed only with investigative authority are not protected by the statute, is inconsistent with the essential thrust of the Court's opinion in *Bramblett*.

The Court most recently construed the word "jurisdiction," as used in Section 1001, in *Bryson* v. *United States*, 396 U.S. 64 (1969). Bryson had been convicted under Section 1001 for filing an affidavit with the National Labor Relations Board, required by then existing Section 9(h) of the National Labor Relations Act, 29 U.S.C. (1958 ed.) 159(h), in which he falsely denied affiliation with the Communist Party. *Bryson* involved a collateral attack on that conviction based on the alleged unconstitutionality of Section 9(h).

This Court affirmed the denial of collateral relief, holding (396 U.S. at 68-69) that the constitutionality of Section 9(h) was irrelevant to the validity of Bryson's conviction because "none of the elements of proof necessary for [Bryson's] conviction under § 1001 has been shown to depend on the validity of

§ 9(h)." Of particular relevance to the present case is the basis for the Court's rejection of Bryson's contention that, because Section 9(h) was unconstitutional, the affidavit requirement was not within the "jurisdiction" of the NLRB. Relying on its prior decisions in *Bramblett* and *Gilliland* for the proposition (396 U.S. at 70) that "there is a valid legislative interest in protecting the integrity of official inquiries," the Court concluded (*ibid.*) that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001."

The court below attempted to distinguish *Bryson* on the ground (Pet. App. 4a) that "[t]he NLRB is an agency with the power to adjudicate rights and establish regulations" and therefore, "under the *Friedman* rationale, would be distinguishable from agencies such as the FBI and Secret Service." In fact, however, neither the adjudicative nor the regulatory aspect of the NLRB's jurisdiction was necessarily involved in *Bryson*. Rather, the affidavit described in Section 9(h) was a prerequisite to the exercise of even the Board's investigatory and prosecutorial powers—*i.e.*, "to the making of an investigation by the Board and the issuance of any complaint for the benefit of the union in question" (*Leedom* v. *International Union of Mine Workers*, 352 U.S. 145, 148 (1956))[7]—precisely the type of "jurisdiction"

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[7] 29 U.S.C. (1958 ed.) 159(h) provided in relevant part (emphasis added):

> No *investigation* shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no *complaint* shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit * * *.

that is exercised by the Department of Justice, the FBI and the Secret Service.

Moreover, in holding (396 U.S. at 70) that the "term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001," the Court relied directly (*id.* at 70-71) on two cases that endorsed the ordinary "power to act" meaning of "jurisdiction" that we urge. In *United States* v. *Adler*, *supra*, cited at 396 U.S. 71, the Second Circuit concluded that the word "jurisdiction," as used in Section 1001, means "simply the power to act upon information when it is received"; on that ground, the court held that false statements made to the FBI were "within the jurisdiction" of that agency (380 F.2d at 922). Similarly, in *Ogden* v. *United States*, 303 F.2d 724 (9th Cir. 1962), cited at 396 U.S. 70-71, the Court held that false statements made in an application for a security clearance by the Air Force were "within the jurisdiction" of the Air Force regardless of whether Air Force regulations required the statements, the need for the clearance was immediate, or the Air Force actually relied on the statements to its injury. The Court explained (303 F.2d at 743):

> A false statement is submitted in a matter within the jurisdiction of a department or agency within the meaning of 18 U.S.C.A. § 1001 if it relates to a matter as to which the Department had the power to act. The Department of the Air Force had ample power to act with respect to classified defense information. It was no interloper here—its interest in the subject matter was official and immediate.

Hence, although the Court in *Bryson* did not focus specifically on the types of agencies or the nature of

the administrative functions to which Section 1001 is applicable,[8] the Court's analysis strongly suggests that the Eighth Circuit's highly technical distinction between types of jurisdiction will not withstand scrutiny.

B. The Legislative History Contains No Support for the Court of Appeals' Refusal to Give Section 1001's Language Its Ordinary Meaning

Ignoring this Court's frequent admonition that the process of statutory construction begins with the language of the statute itself, the *Friedman* court instead commenced its "examination of [Section 1001] * * * by viewing the historical circumstances in which [the statute] was cast" (374 F.2d at 366). Even this approach, however, does not yield the result urged by the court of appeals and respondent. This Court has repeatedly examined the same history of Section 1001 on which the Eighth Circuit relied (*ibid.*) and has found no basis for avoiding a literal application of this broadly worded statute. See *Bramblett*, 348 U.S at 507-508; *Gilliland*, 312 U.S. at 93-95. Nor have we discovered anything in the scant history of the language at issue here that justifies the court of appeals' departure from the plain language of the statute.

1. Section 1001 has its origin in a law enacted more than a century ago. The first proscription of unsworn false statements was included in a statute passed during the Civil War to punish the knowing presentation of false or fraudulent monetary claims against the United States. False statements were

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[8] The court noted in *Bryson* (396 U.S. at 71 n.10): "We have no occasion in the present context either to approve or disapprove *Friedman*'s holding."

punishable only if they furthered "the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim[s]." Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696. In 1918, Congress broadened the false claims proscription to include as well false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015.

The language of Section 1001 that is at issue here first appeared in the 1934 revision of the false claims/false statements statute. Until that time, punishable false statements remained closely linked to monetary and proprietary fraud upon the government.[9] The 1934 amendment deleted the requirement of a specific purpose, however, and enlarged the scope of punishable false statements to include false statements made "in any matter within the jurisdiction

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[9] Prior to the 1934 amendment, the false statement portion of the statute provided (40 Stat. 1015-1016):

> [W]hoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

See also note 6, *supra*.

of any department or agency of the United States or of any corporation in which the United States of America is a stockholder." Act of June 18, 1934, ch. 587, 48 Stat. 996.[10] The legislative history of the amendment indicates that the class of proscribed false statements was enlarged in response to a request by the Secretary of the Interior for legislation broad enough to punish the presentation of false papers in connection with the shipment of "hot oil" [11] and the submission of false statements of wages paid on Public Works Administration projects. S. Rep. 1202, 73d Cong., 2d Sess. (1934). See also *United States* v. *Bramblett*, 348 U.S. at 507; *United States* v. *Gilliland*, 312 U.S. at 93-95.

2. Noting (374 F.2d at 366) that the initial impetus for the 1934 amendment was the Secretary of the Interior's request for regulation of "hot oil" shipments and that the revision was made at the same time "the government, at an accelerated pace, began entering the field of economic reform and regulation," *Friedman* concluded (*ibid.*) that the "immediate and primary purpose in amending the old 'fraudulent claims' statute was to curtail the flow of false infor-

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[10] The current form of the statute is the result of the 1948 revision of Title 18. The false claims portion of the statute became 18 U.S.C. 287; the false statements portion became 18 U.S.C. 1001. Act of June 25, 1948, ch. 645, 62 Stat. 683, 698, 749.

[11] "Hot oil" was oil produced cheaply enough to be sold for less than the parity price established under regulations promulgated under the National Industrial Recovery Act, Pub. L. No. 73-67, § 9, 48 Stat. 200. The government wanted to eliminate the shipment and sale of such oil in order to restore healthy competitive conditions to the market. See *United States* v. *Socony-Vacuum Oil Co.*, 105 F.2d 809, 816-818 (7th Cir. 1939), rev'd, 310 U.S. 150, 171-174 (1940).

mation to the newly created regulative agencies." The court added (*ibid.*): "Though the statute was drafted in broad inclusive terms, presumably due to the numerous agencies and the wide variety of information needed, there is nothing to indicate that Congress intended this statute to have application substantially beyond the purposes for which it was created."

The Eighth Circuit's analysis of the legislative history is fundamentally flawed. To be sure, an immediate motivation underlying the 1934 amendment was to criminalize the giving of false information to certain newly-created regulatory agencies. But nowhere in the legislative history did Congress indicate that protecting the regulatory agencies with which the legislation's sponsors were immediately concerned was the exclusive purpose of the statute. To the contrary, neither the committee reports [12] nor the brief floor debates [13] contain the slightest suggestion that "the scope of the statute was to be in any way restricted" or the word "jurisdiction" narrowly construed. *Bramblett*, 348 U.S. at 507. More specifically:

> The legislative history does not suggest that the purpose of the amendment was in any way intended to be confined to the specific situations which were mentioned. The very broad language of the amendment suggests that these situations were merely cited as examples of the kind of conduct which the statute was designed to prohibit. And the quite different character of the two examples which were given [the prevention

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[12] S. Rep. 1202, *supra*; H.R. Rep. 1463, 73d Cong., 2d Sess. (1934).

[13] 78 Cong. Rec. 8136-8137, 11270-11271, 11513 (1934).

> of false reports on shipments of "hot oil" and false statements of wages paid on Public Works Administration projects] may also be taken as representing the broad application intended for the statute.

United States v. *McCue*, 301 F.2d 452, 454-455 (2d Cir. 1962). As this Court noted in *Gilliland*, 312 U.S. at 95, "[t]he fact that the Secretary of the Interior was [in 1934] seeking aid in the enforcement of § 9(c) of the National Industrial Recovery Act * * * in no way affects the present application of the statute. Its provisions were not limited to the enforcement of § 9(c) of the National Industrial Recovery Act * * *."

The *Friedman* court thus erred in concluding that what "was surely a key part of [the] program" was "the *sole* purpose of the [statute]." *United States* v. *Naftalin*, 441 U.S. 768, 775 (1979) (emphasis in original). The court similarly erred in refusing to apply Section 1001 to conduct that plainly is covered by the statutory language simply because there was no express mention in the legislative history of an intent to reach the conduct at issue. As this Court noted in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) (footnote omitted), "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." See also *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980) (rejecting argument that "would permit an omission in the legislative history to nullify the plain meaning of a statute"). Here, as in *United*

States v. *Culbert*, 435 U.S. 371, 377 (1978), nothing in the legislative history "supports the conclusion that Congress did not intend to make punishable all conduct falling within the reach of the statutory language."

Indeed, if anything, the history of Section 1001 reinforces its plain language. When, in previous versions of the false statement statute, Congress intended to restrict the reach of the statute to false statements made for particular purposes, it enumerated those purposes expressly. As noted above, the Act of March 2, 1863, specified that false statements were punishable only if they furthered "the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim" (12 Stat. 696). The Act of October 23, 1918, added the proscription against false statements made "for the purpose * * * of cheating and swindling or defrauding the Government of the United States" (40 Stat. 1015). By the 1934 revision, however, Congress deleted outright any requirement of purpose (see *Bramblett*, 348 U.S. at 507-508) and substituted the broad "in any matter within the jurisdiction of any department or agency" language. Had Congress intended the statute to apply only to false statements made for the purposes identified by the Eighth Circuit—to obtain a monetary award or governmental privilege or to affect an administrative determination—it surely would have stated this requirement expressly, as it always had done in the past, rather than relying on an oblique reference to "jurisdiction" to convey its meaning.

Furthermore, the version of the 1934 amendment to the false statement statute that finally was enacted (48 Stat. 996) represented that Congress's second attempt to broaden the statute. Unlike the 1934 amend-

ment that became law, the earlier bill, as amended by the House and passed by Congress, had required an "intent to defraud the United States." Although the President refused to sign the earlier bill on the ground that the offense, as so defined, already was covered, and more severely punished, by existing law (see 78 Cong. Rec. 6778-6779 (1934)), the history of the prior bill is instructive with respect to the question whether Congress intended Section 1001's protection to be limited only to certain, newly created regulatory agencies.

The first bill, as proposed by the Secretary of the Interior, was entitled a bill "to provide a penalty for the presentation of a false written instrument relating to any matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry." See S. Rep. 288, 73d Cong., 2d Sess. 1 (1934). It provided (78 Cong. Rec. 2152 (1934)) (emphasis added)):

> That every person who knowingly or willfully makes or aids, or assists in the making, or in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, or paper or writing purporting to be such, concerning any application, bond, bid, loan, or payment thereof or pertaining *to any other matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry* * * * shall be punished by a fine not exceeding $5,000, or by imprisonment for a term of not more than 5 years.

Both in the Senate Judiciary Committee and on the floor of the Senate the suggestion was made that the "bill be extended and broadened in its terms so as to cover *all the departments* * * *." 78 Cong. Rec. 2858 (1934) (remarks of Sen. Borah) (emphasis added). The Senate agreed to the suggestion, and the bill was amended to substitute the words "any other matter within the jurisdiction of any department or agency of the Federal Government" for the words "any other matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry." 78 Cong. Rec. 2858-2859 (1934). In view of this amendment, the title of the bill also was changed to "[a] bill to provide a penalty for the presentation of a false written instrument relating to any matter within the jurisdiction of any department or agency of the Federal Government." *Id.* at 2859.

The House Judiciary Committee likewise "broadened" the draft legislation proposed by the Secretary of the Interior "to punish [the proscribed acts] committed before *any department or agency of the Federal Government*, or corporation owned wholly or in part by the Government * * *." H.R. Rep. 829, 73d Cong., 2d Sess. 2 (1934). Congress's deliberate and thoughtful substitution of the phrase "any department or agency" for the enumerated agencies demonstrates that it intended the broad language of the statute to be afforded its full scope, and not to be restricted to the particular circumstances that provided the initial motivation underlying the legislation.[14]

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[14] To the extent Representative McKeown's remarks (78 Cong. Rec. 3724 (1934)) might be construed as intending a

In short, the history of 18 U.S.C. 1001 provides no basis whatever for refusing to give the language of the statute its ordinary and natural meaning. To the contrary, if anything the legislative history indicates that the statute should be broadly construed, and not limited to the particular situations that provided the immediate impetus for enactment. Accordingly, in the absence of any indication that Congress sought to exclude false crime reports from the reach of Section 1001, the Court should afford the plain language of the statute its full scope.

C. The Additional Objections of the *Friedman* Court to a "Plain Language" Construction of Section 1001 Are Without Merit

Cognizant that its construction of Section 1001 defied the plain language of the statute, the Eighth Circuit bolstered its decision in *Friedman* with three additional arguments that we can describe only as "makeweights." As we show below, none warrants departure from customary principles of statutory construction.

1. In support of its decision in *Friedman*, the Eighth Circuit noted (374 F.2d at 366 & n.1) that the general perjury statute, 18 U.S.C. 1621, prescribes a lesser maximum penalty than does Section 1001. Inferring (374 F.2d at 366) that "Congress [could not have] considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before a court of law," the court of appeals concluded that Section 1001

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narrower scope, it must be remembered that he was commenting on the bill that contained the restrictive "intent to defraud" requirement. Moreover, his reference to the "new operations of the Government" in no way suggests that the reach of the statute was limited to those operations.

does not reach false reports of crime made to law enforcement officers.[15] The short answer to this argument is that which this Court gave to a similar contention in *Gilliland*, 312 U.S. at 95: "The matter of penalties lay within the discretion of Congress." See also *United States* v. *Batchelder*, 442 U.S. 114 (1979) (fact that conduct is covered by two statutes, each of which authorizes a different maximum penalty, no bar to sentencing defendant under more severe penalty).

In addition, we note that even under the *Friedman* court's restrictive construction of Section 1001, the statute would reach misconduct that is patently less serious than giving false testimony in a judicial proceeding. For example, the statute has been applied—consistently with the holding in *Friedman*—to such relatively minor offenses as lying on an application for temporary employment at the Post Office (*Blake* v. *United States*, 323 F.2d 245 (8th Cir. 1963)) and misstating the amount of sugar owned in an application for sugar ration books (*United States* v. *Wright*, 48 F. Supp. 687 (D. Del. 1943)).

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[15] At the time of the 1934 amendment to the false statement/false claims statute, by which the "matter within the jurisdiction" language was first added, the maximum penalty provided was a fine of $10,000 and ten years' imprisonment or both (48 Stat. 997). The term of imprisonment was decreased to the present five-year maximum in 1948, when the statute was divided into two parts—the false claims portion, 18 U.S.C. 287, and the false statements portion, 18 U.S.C. 1001. 18 U.S.C. 1621 provides for a maximum sentence of a $2,000 fine and five years' imprisonment. Under 18 U.S.C. 1623, enacted in 1970, subsequent to the decision in *Friedman*, perjury committed in grand jury and judicial proceedings may be punished to the same extent as a false statement under Section 1001, *i.e.*, by up to five years' imprisonment and a $10,000 fine.

Furthermore, Section 1001 overlaps numerous false statement statutes ranging from the trivial (see, *e.g.*, 16 U.S.C. 371 (false oath as to financial condition of user of free bathhouse at National Park)) to the more serious (see, *e.g.*, 18 U.S.C. 1007 (false statement to the Federal Deposit Insurance Corporation)). With respect to most of these offenses, the maximum penalties authorized by Congress are the same as or less severe than that authorized by 18 U.S.C. 1621,[16] thus indicating, according to the *Friedman* rationale, that Congress regarded them as no more serious than perjury. Yet, even applying the Eighth Circuit's restrictive definition of "jurisdiction," such offenses presumably also may be prosecuted and punished to the maximum extent under Section 1001—*i.e.*, more harshly than giving false testimony in a judicial proceeding may be punished under Section 1621. In short, any anomaly arising from the disparity between the penalty provisions of Sections 1001 and 1621 is not cured by the restrictive construction of Section 1001 adopted by the Eighth Circuit.

Moreover, the *Friedman* court's analysis unjustifiably assumes that making a false report to the FBI or Secret Service is necessarily a less serious offense than giving false information to a regulatory agency for the purpose of obtaining a pecuniary benefit or other governmental privilege. False crime reports in fact have great potential for causing harm, both be-

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[16] See, *e.g.*, 16 U.S.C. 371 ($300 fine and 60 days' imprisonment); 18 U.S.C. 1007 ($5,000/two years); 18 U.S.C. 1008 (false statement to Federal Savings and Loan Insurance Corporation) ($5,000/two years); 18 U.S.C. 1010 (false statement to Department of Housing and Urban Development and Federal Housing Administration) ($5,000/two years); 18 U.S.C. 1011 (false statement to federal land bank) ($5,000/one year).

cause they may precipitate wasteful and expensive criminal investigations and because they may bring to bear on innocent individuals the full brunt of the government's investigative and prosecutorial capabilities, infringing on the individual's privacy and jeopardizing his well-being. As the Second Circuit stated in *United States* v. *Adler*, 380 F.2d at 922: "The making of intentionally false statements to the F.B.I. calculated to provoke an investigation by that agency may cause more 'perversion' of authorized agency functions—and more harm to individuals—than false pecuniary and property claims which are clearly covered by the statute." The views of the dissenting judge in *Friedman*, 374 F.2d at 376-377, also are worth quoting at length:

> The fact is, false statements made in matters peculiarly within the "investigative jurisdiction" and authorized governmental function of the Department of Justice may be exceedingly vicious and potentially dangerous and harmful to others, especially in matters relating to the protection and enforcement of important constitutional rights of private citizens. Such statements may relate to matters involving the safety and protection of important officers in one of the three branches of our government, and conceivably might have a direct and important bearing on our national security. Any such statements would necessarily initiate expensive and time-consuming proceedings by government agents and the substantial exercise by them of their official functions—matters of much more public concern, in my opinion, than a relatively innocuous false civil claim for monetary benefit or personal privilege.

On the other hand, as noted above, Section 1001 as construed by the Eighth Circuit still covers a broad range of conduct, some of which is utterly trivial when compared to false crime reports. Accordingly, the fact that the maximum penalty applicable to violations of 18 U.S.C. 1001 exceeds that prescribed in the general perjury statute provides no basis for excluding from the reach of Section 1001 false statements made to investigatory, rather than regulatory, agencies.

Finally, the *Friedman* court failed to appreciate that when Congress prescribes a maximum penalty for a particular offense—especially one as broad as making "any false * * * statement" to "any department or agency"—it is not thereby suggesting that the maximum punishment would be appropriate for every variety of the described offense. It rather is Congress's intention that the courts employ their discretion to impose sentence, within the authorized range, according to the nature of the particular violation. As this Court stated in *Gilliland*, 312 U.S. at 95, the predecessor statute to Section 1001 "covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations."

2. The *Friedman* court's second objection to the "plain meaning" construction of Section 1001 is that it "would completely remove the necessity for taking oaths" (374 F.2d at 367). There is no basis for this concern.

The court first opined (374 F.2d at 367) that if a literal application of the statute were adopted, "[t]he numerous statutes authorizing investigative agencies to administer oaths would be rendered useless." At

the outset, we note that the fact that the taking of an oath is not an element of the offense stated in Section 1001 in no way eliminates the utility of oaths. Where used, oaths serve an important function in reminding individuals of their obligation to tell the truth and in serving notice that false statements could subject them to criminal prosecution. In any event, since FBI and Secret Service agents have only very limited authority to administer oaths—authority that is not applicable to situations like that presented here or in *Friedman*[17]—no statutory provision would be "rendered useless" by applying Section 1001 to the conduct at issue here.

Nor is there any basis for the *Friedman* court's assumption that if Section 1001 applies to false crime reports to the FBI and Secret Service it must also reach false statements made under oath in a court of law.[18] Indeed, the only two courts of appeals to consider both questions have held that Section 1001 covers the former but not the latter conduct. See *United States* v. *Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc), and *United States* v. *Abrahams*, 604 F.2d 386, 392-393 (5th Cir. 1979); *United States* v. *Adler*, *supra*, and *United States* v. *D'Amato*, 507 F.2d 26 (2d

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[17] 5 U.S.C. 303 provides that "[a]n employee of an Executive department lawfully assigned to investigate frauds on or attempts to defraud the United States, or irregularity or misconduct of an employee or agent of the United States, may administer an oath to a witness attending to testify or depose in the course of the investigation."

[18] The court stated (374 F.2d at 367): "Since the Judiciary is an agency of the United States Government, a strict application of [Section 1001] would remove the time-honored and now necessary formality of requiring witnesses to testify under oath. We simply cannot believe that Congress intended to supplant the existing perjury statutes and destroy the protections they afford."

Cir. 1974). Significantly, the decisions of the courts that have refused to apply Section 1001 to false statements made during judicial proceedings generally have turned on the construction of the term "department or agency," rather than on the word "jurisdiction." Thus, these courts held that the federal judiciary is a "department or agency" within the meaning of Section 1001 only with respect to its housekeeping or administrative functions, not with respect to judicial proceedings themselves. See *United States* v. *Abrahams*, 604 F.2d at 392-393; *United States* v. *Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967); *Morgan* v. *United States*, 309 F.2d 234, 237 (D.C. Cir.), cert. denied, 373 U.S. 917 (1962). Cf. *United States* v. *Allen*, 193 F. Supp. 954, 957-959 (S.D. Cal. 1961) (grand jury not an "agency of the United States" within the meaning of Section 1001).

These cases make clear that, whatever the relevance of Section 1001 to false statements made in the context of judicial proceedings, that issue is independent of the statute's applicability to false crime reports made to the FBI and Secret Service. Indeed, the application of Section 1001 to judicial proceedings would seem to follow more logically from the *Friedman* court's construction of "jurisdiction" as denoting the power "to make monetary awards," "adjudicate rights" and "dispose of the problem giving rise to the inquiry." 374 F.2d at 367, 368.

3. The *Friedman* court also was "influenced by the important social policy that is served by an open line of communication between the general public and law enforcement agencies" (374 F.2d at 369). In the court's view, adoption of a construction of Section 1001 that covers false crime reports would inhibit citizens from making good faith reports of

suspected offenses to law enforcement authorities (*ibid.*).

Like the Second and Fifth Circuits (*United States* v. *Lambert*, 501 F.2d at 946; *United States* v. *Adler*, 380 F.2d at 922) and the dissent in *Friedman*, 374 F.2d at 376, we think it unreasonable to suppose that an individual acting innocently and in good faith would be deterred from reporting a suspected crime by the specter of liability under Section 1001. After all, the offense stated in Section 1001 is the "knowing[] and willful[]" making of a false statement; there is no liability under the statute merely because the reported information turns out to be false. *United States* v. *Lambert*, 501 F.2d at 946.

In addition, because the law enforcement arm of government itself has a paramount interest in keeping its lines of communication with the public open, it can be expected not to employ Section 1001 in any way that would deter private citizens from reporting crime. As the Fifth Circuit noted in *Lambert*, 501 F.2d at 976, "the potential for overzealous application of § 1001 by law enforcement agencies poses a limited threat because investigators, to whom access to information is critically important, would not want to gain a reputation for routinely seeking to prosecute complainants and informants who give false information." In short, there does not appear to be a substantial danger that the construction of Section 1001 that we urge would deter individuals from conveying information that they believed to be truthful to the FBI or other law enforcement agencies.[19]

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[19] As the Fifth Circuit noted (*United States* v. *Lambert*, 501 F.2d at 946), there is "no objective data defining the extent of this risk [of deterrence], and judges differ in their subjective estimates." Particularly in these circumstances, the

The *Friedman* court's "makeweights" thus provide no basis for excluding voluntarily made false crime reports from the reach of Section 1001. Indeed, considerations of policy support precisely the opposite conclusion. Respondent's conduct, like that involved in *Bramblett*, 348 U.S. at 509, is not of the type "Congress could * * * have intended to leave * * * without penalty." As we discussed above, false crime reports have great potential for causing harm, both in the form of diverting scarce resources from bona fide governmental functions and in the form of the embarrassment and inconvenience that may be experienced by the innocent individuals about whom the false reports are made. In our view, such conduct, when intentionally committed, is unquestionably deserving of criminal sanction. As we showed above (pages 11-13, *supra*), the plain language of Section 1001 covers the conduct in question; the Eighth Circuit has offered no persuasive justification for construing it to create an unreasonable gap in the protection afforded federal agencies and the individuals subject to their investigations.

Eighth Circuit erred in injecting its own views on "important social policy" into what is purely a question of statutory construction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

Petitioner

v.

LARRY WAYNE RODGERS,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT

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FOR ARGUMENT

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1001 should be so broadly construed as to prohibit oral, unsworn and unrecorded false statements given to investigatory agencies such as the Federal Bureau of Investigation and Secret Service.

2. If so, whether it is consistent with due process to apply a judicial enlargement of a cimrinal statute retroactively to this respondent.

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SUMMARY OF ARGUMENT

1. At issue in this case is whether 18 U.S.C. § 1001 should be so broadly construed as to encompass oral, unsworn false statements given to investigatory agencies such as the F.B.I. or Secret Service. In holding that such statements are not within the purview of the statute, the Eighth Circuit, in *Friedman* v. *United States*, 374 F.2d 353 (8th Cir. 1957), and *United States* v. *Rodgers*, 706 F.2d 854 (8th Cir.), *cert. granted*, ___ U.S. ___, No. 83-620 (Dec. 5, 1983), took a reasonable, common-sense view of the statute, an approach that is amply supported by the plain meaning of the words of the statute, case precedent, the legislative history of the statute, relevant rules of statutory construction and significant legal and social policy concerns.

2. Should this Court rule, however that the present Indictment does state a crime under § 1001, because false statements made to investigatory agencies are within the jurisdiction of an agency or a department of the Government, such a decision would announce a new rule in the Eighth Circuit and, consistent with due process, could not be made to apply retrospectively to this respondent.

I.A.

The term "jurisdiction" is an ambiguous word that is not susceptible to a single definition. It is often understood, however, to mean the power to finally dispose of a matter. In that commonly accepted sense, the Eighth Circuit's definition of "jurisdiction" is neither unique nor technical, but entirely consistent with an ordinary perception of that word.

Nor is the Eighth Circuit alone in recognizing such a definiton as a common meaning of the word "jurisdiction." Dictionaries, legal encyclopedias and case law from other jurisdictions all note the "clear distinction between the power to investigate and the jurisdiction . . . to decide and act upon a particular subject matter." *Friedman* v. *United States*, *supra*, at 367. Moreover, *Friedman* is consistent with a long line of case

authority holding that some effective limits must be placed on the statute.

While support may be found for the proposition that "jurisdiction" can, under some circumstances, take on a broader significance, there is no requirement, in construing an ambiguous penal statute, to assume that Congress intended the widest possible application.

I.B.

1. Not only is an overly broad reading not mandated, it is, in this instance, discouraged; for an ambiguous penal statute is ordinarily construed strictly to favor the party accused. The applicability of this rule of lenity is especially favored in the present case, because Congress in enacting the statute expressed no clear intent to reach the conduct involved here. Moreover, the concepts of fairness that underlie the purpose for the rule of lenity argue strongly for a strict construction in this case.

2. In addition to the rule of lenity, a second rule of statutory construction demands adoption of the Eighth Circuit's interpretation of § 1001. Petitioner's overly expansive reading of the statute results in absurd or unjust consequences, and so violates the maxim: courts should ". . . construe statutes so as to avoid absurd or glaringly unjust results. . ." *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932). It is difficult to believe that Congress, in enacting § 1001, viewed oral, unsworn misstatements to the F.B.I. more seriously than perjury in a court of law; and, yet, acceptance of petitioner's interpretation of the statute can only lead to that absurd conclusion. Furthermore, an aggressively literal approach to the statute favored by the petitioner will provide a disincentive for investigative agencies to administer oaths in precisely those situations where Congress felt it especially important to do so. Finally, enlarging the scope of § 1001 beyond what was clearly contemplated by Congress will have the effect of undermining the judicially administered oath. This is an especially dangerous prospect because the procedural safeguards available under

the perjury law are not applicable in a § 1001 prosecution. Consequently, the unreasonable expansion of § 1001 urged by petitioner will provide an avenue through which the checks and balances inherent in a perjury prosecution can be easily bypassed.

I.C.

1. The legislative history of § 1001 provides no support for petitioner's construction of the statute. Instead, the congressional reports and debates reveal a limited purpose to expand the existing false statement law to provide protection against non-monetary frauds perpetrated against the newly formed regulative agencies created in response to the depression. There is no indication in the legislative history that Congress intended the far reaching consequences for § 1001 now claimed by the petitioner. In the absence of any such clear congressional intent, it would be an act of judicial legislation, at odds with the plain language of the statute, rules of statutory construction and the legislative history, to impose upon the slender frame of § 1001 the heavy burden proposed by the petitioner.

2. Moreover, subsequent legislative inaction lends weight to the conclusion that Congress had no intention in 1934 to criminalize misstatements to the F.B.I. Since the *Friedman* case was decided in 1967, Congress, on at least two occasions, considered, but failed to enact, legislation that would specifically address false statements to law enforcement agencies. Congress' inaction, despite its awareness of the holding in the *Friedman* case, tends to confirm the correctness of the Eighth Circuit's approach to the statute.

3. Even if it is assumed that the legislative history of § 1001 evidences no positive congressional intent to limit the statute's application to regulatory agencies or departments, it is encumbent upon the petitioner, the party proposing a broad interpretation of an ambiguous penal statute, to point to language that is clear and definite in support of the harsher

alternative. *United States* v. *Bass*, 404 U.S. 336, 347 (1971). Instead, the legislative history indicates, at best, congressional unawareness of the issue. This lack of debate is crucial; for as this Court has recently noted, "a legislative history that fails to evidence congressional awareness of the statute's claimed scope" is a factor that must be weighed againt reading an ambiguously worded penal statute broadly. *Williams* v. *United States*, 458 U.S. 278 (1982).

I.D.

1. Additional policy concerns support the result reached in *Friedman*. *Friedman* promotes an open line of communication between the public and law enforcement departments. Because sources of police information often come from individuals already suspicious of the criminal justice system, it is unrealistic to assume that voluntary prosecutorial restraint will prevent the disappearance of some vital information. Ironically, adoption of petitioner's reading of § 1001 will encourage, rather than deter, overall criminal activity.

2. The *Friedman* rule also guarantees that individuals who have valid civil rights complaints against law enforcement officials will not be deterred from pursuing those rights out of fear of harassment or revenge.

3. In addition, the *Friedman* approach has the advantage of harmonizing the so-called "exculpatory-no" problem. Since, under *Friedman*, virtually any statement given to an investigatory agency in the course of an investigation is not subject to the statute, the difficult issues involved in a typical "exculpatory-no" situation are avoided.

4. Finally, several courts have recently become concerned that unless § 1001 is limited to written or recorded statements, defendants charged under that statute would be unable to avail themselves of the technical defense provided in *Bronston* v. *United States*, 409 U.S. 352 (1973). While it is as yet unclear whether a *Bronston* defense is applicable in a § 1001 context, requiring an accused to construct a defense based only on the

sketchy notes of an agent is disturbing. The *Friedman* rule, by excluding all statements to investigative agencies, avoids this problem, at least in the context of investigative inquiries.

II.

If this Court should impose a new rule in the Eighth Circuit and declare that *Friedman* and *Rodgers* were wrongly decided, due process would prohibit the retrospective application of this new rule to this respondent.

A judicial enlargement of an existing criminal statute operates precisely like a legislative enactment of a new penal law. Congress is prohibited by the *ex post facto* ban to retroactively apply new laws to old conduct. Similarly, the Due Process Clause bars the judiciary from declaring illegal, activity which was legal when done. As this Court held in *Bouie* v. *city of Columbia*, 378 U.S. 347 (1964), "the fundamental principle that "the required criminal law must have existed when the conduct in issue occurred,' . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislature." *Id.* at 354, quoting, Hall, *General Principles of Criminal Law* (2d ed. 1960), at 58-59.

Adoption of petitioner's broad view of § 1001 would represent a wide departure from current Eighth Circuit law. This is particularly so in view of the length of time during which the *Friedman* rule has been in effect and in view of the general applicability that the *Friedman* holding was intended to have. Consequently, subjecting respondent's past behavior to a radically new standard of criminal conduct announced long after the act was completed is a retroactive application of a criminal law that is in clear violation of the Due Process Clause, U.S. Constitution, Amendment V.

ARGUMENT

I. ORAL, UNSWORN COMPLAINTS GIVEN TO INVESTIGATORY AGENCIES ARE NOT SUBJECT TO CRIMINAL PROSECUTION UNDER 18 U.S.C. § 1001

In *Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967), a panel of the Eighth Circuit examined the meaning of the term "jurisdiction" as used in 18 U.S.C. § 1001. In construing that word, that Court recognized a "clear distinction between the power to investigate and the . . . authority to decide and act upon a particular subject matter." *Friedman* v. *United States*, *supra*, at 367. Because the Eighth Circuit was understandably reluctant to accept a sweeping interpretation of the statute that could subject to severe criminal punishment anything more than "a casual social conversation with a government employee. . ." (*Id.* at 366), the Court defined "jurisdiction" as "the power to dispose of the problems or compel action" (*Id.* at 367), thereby excluding from coverage of the act investigative agencies such as the Federal Bureau of Investigation and the Secret Service. This concept of "jurisdiction" was reaffirmed by a unanimous panel in the present case. *United States* v. *Rodgers*, 706 F.2d 854 (8th Cir.), *cert. granted*, ___ U.S. ___, No. 83-620 (Dec. 5, 1983).

The petitioner now argues that the plain, ordinary meaning of the word "jurisdiction" implies much more than the "power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem. . . ." *Friedman* v. *United States*, *supra*, at 368. Rather, petitioner states " 'jurisdiction' denotes simply the 'power or right to exercise authority. . . ." Brief for the United States, p. 12, quoting, *Webster's Third New International Dictionary* 1227 (1967). The difficulty with petitioner's assertion, however, is that there is simply no convincing authority for the proposition that the Eight Circuit's definition of "jurisdiction" is unique or

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[1] Following the decision in *Rodgers*, affirming the district court's dismissal of the present Indictment, the Government filed a Petition for Rehearing *en banc*, which was denied by the full Court on July 25, 1983. (Pet. App. 8a)

unusual and the petitioner's proposed meaning is the only commonly accepted one.

Certainly, the legislative history of § 1001 offers no support for an unfettered reading of the word "jurisdiction." In fact, as will be demonstrated below (pp. 31 to 38, *infra*), the legislative reports and debates pertaining to the passage of this language reveal that the reach claimed by the petitioner for the statute was never intended by Congress.

Moreover, the overly broad gloss favored by the petitioner not only does violence to two well-recognized rules of statutory construction, but would unleash a set of social and legal problems which may be difficult or impossible to resolve.

A. THE EIGHTH CIRCUIT ACCORDED THE TERM "JURISDICTION" A REASONABLY BROAD, NON-TECHNICAL DEFINITION CONSONANT WITH A COMMON UNDERSTANDING OF THE MEANING OF THAT WORD

Petitioner bases his argument on two rules of statutory construction: (1) in the absence of ambiguity and legislative intent to the contrary, statutory language " 'must ordinarily be regarded as conclusive.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), Slip Op. 4, quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See, Brief for the United States, p. 11; and (2) " 'legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello* v. *United States*, *supra*, Slip Op. 4, quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962). See, Brief for the United States, p. 12. These general rules of construction can indeed be helpful if properly applied. Petitioner, however, while correctly stating the law, fails to accurately analyze its application to the facts in this case. The fatal flaw in petitioner's argument is his unstated assumption that the definition of "jurisdiction" adopted by the *Friedman* Court is not an ordinary or common meaning of that word simply because it does not encompass an entire range of meanings. Respondent is not aware of, nor does petitioner cite to, any authority that equates most common use of a term with the

broadest possible definition of that term. As will be demonstrated below, the definition of "jurisdiction" used by the Eighth Circuit fits well within a common understanding of that word. There is no reason to conclude that the hazy, overbroad definition proposed by the petitioner is any more ordinary in its meaning than that employed by the *Friedman* Court.

"Jurisdiction," which in the Latin means literally, "I speak by the law," has been variously defined, but often "implies a court or tribunal with judicial power to hear and determine a cause. . . ." 50 C.J.S. *Jurisdiction* 1090 (1947). The term "expresses the concept of legal power to interpret and administer the law. . ." (*Id.*) and "has been generally defined . . . in connection with individuals or bodies which are not a part of the judiciary . . ., as the power to hear and determine a cause . . ., the . . . capacity . . . to entertain, hear and determine certain controversies; [or] the power to inquire into facts and apply the law. . . . *Id.* at 1091. This Court, while never having occasion to define the word in a § 1001 context, has recognized that in its "popular sense" jurisdiction means the "authority to apply the law to the acts of men." *Wedding* v. *Meyler*, 192 U.S. 573, 584 (1903).

A single, correct meaning for the word "jurisdiction" does not appear to be readily avialable, yet there is a sense inherent in many of the definitions that "jurisdiction" involves, if nothing else, the power to "hear and determine issues. . . ." 50 C.J.S. *Jurisdiction* 1091 (1947). The definition adopted by the Court in *Friedman* is, in this regard, squarely within the generally understood meaning of the term; for the Eighth Circuit's decision merely defines "jurisdiction" in terms of an agency's power or authority to finally dispose of a matter. *Friedman* v. *United States*, *supra*, at 369. As one commentator has put it, the Court decided in *Friedman* that "an agency has 'jurisdiction' only when it has dispositive regulatory power over the matter in issue." Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451, 457 (1977). There is no significant distinction between *Friedman's* "dispositive regulatory power over the

matter" and the generally accpeted notion that "jurisdiction" involves "the capacity . . . to entertain, hear and determine certain controversies." 50 C.J.S. *Jurisdiction* 1090 (1947). Far from being the "cramped" or "technical" definition described by the petitioner the Court's view of the word "jurisdiction" is entirely consistent with an ordinary understanding of that term.

Nor does petitioner's reference to *Webster's Dictionary* lend support to his position. Brief for the United States, p. 12. While it is true that one definition of "jurisdiction" is given as "power or right to exercise authority," it is far from clear what is meant by the key term, "authority." The word "authority" is defined elsewhere by *Webster's* as the "power to . . . receive submission"; or "superiority derived from a status that carries with it the right to command and give final decisions" or the "power to influence thought and opinion." *Webster's Third New International Dictionary* [Unabridged] 146 (1966). It is not easy to see how "jurisdiction" as an "authority" so defined relates in any meaningful way to the purely investigative functions of an agency, despite petitioner's unstated assumption that it does.

Moreover, petitioner is compelled to admit that *Webster's* first defines "jurisdiction" in another way, as " 'the legal power . . . to hear and determine a cause . . .' legal power to interpret and administer the law in the premises.' " Brief for the United States, pp. 12-13, n. 3. Even though this definition is similar to the interpretation placed upon the statute by the *Friedman* Court, petitioner dismisses it as not representative of ordinary usage. Brief for the United States, pp. 12-13, n. 3. The explanatory notes in *Webster's* make clear, however, that in cases where a meaning is no longer in standard use, the status labels "obs," for "obsolete" or "archaic" will be shown before the definition. *Webster's Third New International Dictionary* [Unabridged] 18a-19a (1966). Significantly, no such usage qualifier appears before the first meaning given for "jurisdiction." While it is true that the order of sense is listed historically in *Webster's*, there is simply nothing from which to

conclude, as petitioner apparently has, that an older meaning cannot also be in ordinary usage today. Certainly, there is nothing out of date in a concept of "jurisdiction" that involves in some way the power to finally dispose of a matter.

It may be true, as the petitioner states, that no dictionary defines jurisdiction "solely" in terms of the power to dispose of issues (Brief for the United States, p. 14); nevertheless, that is a commonly understood attribute of "jurisdiction," and there is no rule of construction that compels the conclusion that all possible usage of a word must be employed in a penal statute.

It is certainly not true, however, despite petitioner's assertions to the contrary (Brief for the United States, p. 14, n. 4), that only *Gonzales* v. *United States*, 286 F.2d 118 (19th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961), provides case authority for the Friedman view of the term "jurisdiction." Rather, the Friedman Court had ample precedent to support its construction of the statute. In *United States* v. *Stark*, 131 F.Supp. 190 (D. Md. 1955), for example, that Court in holding that denials given to F.B.I. agents, even if made under oath, are "not within the jurisdiction of the F.B.I. or the Department of Justice . . ." (*Id.* at 207), recognized the crucial "distinction between the power to investigate and the jurisdiction or authority to decide and act upon a particular subject matter." *Id.* at 206-207. Similarly, the Court in *United States* v. *Davey*, 155 F.Supp. 175 (S.C. N.Y. 1957), ruled, at least in part, that the investigative function of the F.B.I. does not constitute jurisdiction for purposes of the act. *Id.* at 177.[2] Clearly, there is more than *Gonzales* to support the *Friedman* Court's in-

[2] Similarly, in *United States* v. *Levin*, 133 F.Supp. 88 (D. Colo. 1953), the defendant was charged under § 1001 with having made false statements to agents of the Federal Bureau of Investigation. That Court, after a lengthy discussion of the history and purpose of the statute, limited its application "to persons under legal obligation to speak or to give information to representatives of an agency or department of the United States *who have authority to finally dispose of the matter being investigated* . . ." *Id.* at 90-91 (emphasis added).

terpretation of "jurisdiction" within § 1001.[3] Consequently, the Eighth Circuit's view of "jurisdiction" is not, as petitioner seems to imply, unique or unusual, but in fact follows a line of relevant case law which recognizes and gives effect to a commonly understood meaning of the word "jurisdiction."

Nor did the *Friedman* Court take a unique position in holding that § 1001 "must have some effective limits." *Id.* at 367. Federal courts have repeatedly refused to apply the statute in a literal manner. For example, despite the apparently all inclusive wording of the statute, at least one court has refused to apply § 1001 to the introduction of false documents in a criminal proceeding. *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967). Another court has found the prohibitions of § 1001 inapplicable to preliminary inquiries by an agency to determine jurisdiction under the Fair Labor Standards Act. *United States* v. *Moore*, 185 F.2d 92 (5th Cir. 1950). A third court held that false statements to a grand jury are not false statements within the meaning of the statute. *United States* v. *Allen*, 193 F.Supp. 954 (1961). The Eighth Circuit has refused to extend coverage of the law to false statements on loan applications, even though some governmental involvement was present. *Terry* v. *United States*, 131 F.2d 40 (8th Cir. 1942). False

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[3] The *Gonzales* Court defined "jurisdiction" in the context of § 1001 as "the right to say and the power to act. . . ." *Id.* at 123. The Eighth Circuit did not misunderstand or misapply this definition in *Friedman*, as petitioner contends. Brief for the United States, pp. 14-16, n. 4. The F.B.I. or Secret Service may investigate possible criminal events, but they may not "decide whether a criminal offense has been committed." *Friedman* v. *United States*, *supra*, at 368 Unlike the R.E.A., the lending agency involved in *Gonzales*, the F.B.I. or Secret Service, in pursuing their investigative functions, do not have "the power to [finally] act on the information submitted." *Gonzales* v. *United States*, supra, at 123. Whereas the R.E.A. could conceivably withhold the granting of a governmental privilege, a loan, the F.B.I. or Secret Service has no equivalent authority. This sense of "power to act" is clearly what the Court in *Gonzales* mean to convey in further defining agency jurisdiction to include "the power . . . to administer and enforce the law," and it is precisely this power that investigatory agencies such as the F.B.I. or Secret Service lack.

statements in a civil suit in Federal Court were held by the Second Circuit not to be within the ambit of the law. *United States* v. *D'Amato*, 507 F.2d 26 (2d Cir. 1974).[4] And sevral courts have ruled that a suspect in a criminal investigation may not be charged with a violation of § 1001 simply because he falsely denies incriminating information, the so-called "exculpatory-no" doctrine. See *United States* v. *Chevoor*, 526 F.2d 178 (1st Cir 1975), *cert. denied*, 426 U.S. 935 (1976), and cases cited therein at 183, n. 9 and 10.

While the specific rationale for refusing to extend coverage of the statute in a particular factual setting may not always be clear or consistent, it is certain that judicial restraint in applying the false statement prohibition has been common. The *Friedman* decision falls squarely within this tradition of restraint.

The Second and the Fifth Circuits have concluded that § 1001 does extend to false statements provided investigatory agencies. It is respectfully suggested that those decisions are incorrect and should not be followed.

United States v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967), is unpersuasive because it lacks a detailed analysis of the legislative history undertaken by the Eighth Circuit in *Friedman*. Additionally, the *Adler* decision is devoid of the kind of careful consideration of policy ramifications so evident in the *Freidman* opinion. Instead, the *Adler* Court relies very heavily on *Bryson* v. *United States*, 396 U.S. 64 (1964). The Second Circuit's dependence on *Bryson*, however, is misplaced, since the factual setting in Bryson differs considerably from that involved in the instant case. See discussion of *Bryson*, pp. 20 to 21, *infra*.

United States v. *Massey*, 550 F.2d 300 (5th Cir. 1977), is factually similar to the case at bar, but that Court did not base its affirmance of a conviction under § 1001 on an independent

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[4] A similar result was reached in *United States* v. *London*, 714 F.2d 1558 (11th Cir. 1983).

analysis of the statute; rather, the Court relied almost entirely on prior precedent in the Fifth Circuit, specifically on *United States* v. *Lambert*, 501 F.2d 943 (5th Cir. 1974), *United States* v. *Massey*, *supra*, at 305. But the authority of *United States* v. *Lambert*, *supra*, is somewhat diminished by the vigorous dissent filed by seven Judges. Those seven Judges did not disagree with the majority's reversal of the defendant's conviction; in fact, they occurred with the result. The dissent wrote to stress the importance "of preserving an open line of communication between private citizens and law enforcement agencies." *Id.* at 952. The dissent recognized that such a signficant national policy can only be impaired by a literal interpretation of § 1001, a position which the Court in *Friedman* adopted and this Court should continue to support. See discussion of this policy concern, pp. 42 to 43, *infra*.

In a further attempt to bolster his argument, petitioner refers this Court to three prior decisions involving § 1001: *United States* v. *Gilliland*, 312 U.S. 86 (1941); *United States* v. *Bramblett*, 348 U.S. 503 (1955); and *Bryson* v. *United States*, 396 U.S. 64 (1969). These cases, however, do not support the petitioner's position that the broadest possible definition for the term "jurisdiction" must be employed. In none of these cases was the Court confronted with an attempt to apply § 1001 to an investigatory agency.

In *United States* v. *Gilliland*, *supra*, this Court merely held that presenting false information about petroleum production to the Department of the Interior falls squarely within the purview of the amended predecessor statute to § 1001. This Court, of course, had ample reason to so hold, since the statute was amended primarily to curb precisely the kind of misrepresentations alleged to have been made by the defendants in that case.[5] The *Gilliland* Court simply gave effect to the intended purpose of the 1934 amendments, to eliminate any "restriction to cases involving pecuniary or property loss to the

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[5] See discussion of the legislative history of § 1001, *infra*, pp. 31 to 38.

government." *Id.* at 93. Nothing in that decision bears upon whether a statute, held to apply to a "hot oil" situation, one of the evils Congress expressly inteded to reach, should be stretched to extend to oral statements made to investigatory agencies such as the F.B.I. or the Secret Service.

To be sure, this Court in *dicta* did indicate that the law was intended to "protect the authorized functions of governmental . . . agencies from the perversion which might result from the deceptive practices described." *Id.* at 93. That statement, however, was made in the context of a discussion as to whether the statute's provisions ought to be limited to the enforcement of the National Industrial Recovery Act. *Id.* at 95-95. This Court, in holding that the protections provided by the false statement statute could be extended to any law under which "the presentation of affidavits, documents . . . is required" (*Id.* at 96), in no way intimated that unsworn oral statements to the F.B.I. would be embraced by the newly amended law.

Nor is it as clear as petitioner asserts that misstatements to investigatory agencies result in the kind of perversion of agency functions that was envisioned by the *Gilliland* Court. The untruths involved in *Gilliland* clearly prevented the Department of the Interior from doing its job; namely, prohibiting the interstate transportation of contraband oil. The same cannot be said for misinformation supplied to the F.B.I. or Secret Service; for while "the giving of false information might have the effect of causing needless investigation, it does not pervert the agency's functions as envisioned by the purposes of the statute. The F.B.I. was only empowered to investigate the claim. This mere investigation of the claim caused no real corruption of its authorized activities." *Friedman* v. *United States*, *supra*, at 366.

United States v. *Bramblett*, supra, also relied on by the petitioner, was no concerned with establishing the boundaries of "jurisdiction"; rather, this Court in that case was confronted with the question of whether the provisions of § 1001 should be limited to executive departments of the Government. *Id.* at

509. No consideration of the statute's applicability to investigatory agencies was undertaken. Consequently, it is unjustified to view the *Bramblett* case as authoritative precedent for an unfetterd construction of the term "jurisdiction." This is especially true since that case involved the kind of pecuniary fraud upon the Government traditionally at the heart of the false statement law. To the extent that the *Bramblett* decision may be read to mean that § 1001 should be construed in a reasonably broad, common-sense manner, the Eighth Circuit's decision in Friedman is not in conflict, for as discussed above (pp. 10 to 14, *supra*), the definition of "jurisdiction" employed by the *Friedman* Court falls squarely within a commonly understood definition of that term.

Finally, the petitioner cites *Bryson* v. *United States*, *supra*, for the proposition that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." Brief for the United States, p. 21. The *Friedman* definition of "jurisdiction," however, is not "narrow" or "technical," but represents a well recognized, reasonably broad view of that word. The *Friedman* decision is not therefore inconsistent with this Court's holding in *Bryson*.

Moreover, the factual setting in *Bryson* differs considerably from that involved in the present case. In *Bryson*, the false statements were not given to a criminal investigatory agency. Instead, the National Labor Relations Board was the victim of the falsehood, an agency which has the power to adjudicate rights and establish binding regulations and which, even under the *Friedman* ratonale, would be subject to the protections of the statute. *United States* v. *Rodgers*, *supra*, at 856.

Additionally, since no criminal investigative department was implicated in *Bryson*, this Court had no occasion to consider the broad social policies protected by the *Friedman* ruling.[6] In fact, this Court expressly refused to "either . . .

[6] For a discussion of some of these policies, see *infra* pp. 42-46.

approve or disapprove *Friedman's* holding." *United States* v. *Bryson*, *supra*, at 71, n. 10.

The petitioner argues that, since an investigative function of the N.L.R.B. may have been affected by the submission of the false affidavit, *Bryson* is in reality good authority for the proposition that *Friedman* and *Rodgers* were incorrectly decided. Brief for the United States, pp. 21-22. The investogatory power of the N.L.R.B., however, does not comprise its sole or even primary function. That power is merely the means by which the agency can determine whether to grant further rights and remedies such as a hearing, an election and a certification thereof. 29 U.S.C. § 159(c)(1).[7] The N.L.R.B., unlike criminal investigatory agencies, retains the power "to adjudicate rights . . . compel the action or finally dispose of the problem giving rise to the inquiry." *Friedman* v. *United States*, *supra*, at 368. Any investigatory function given to the N.L.R.B. is merely ancillary to its broader authority to "finally dispose of the problem." *Id.*

In the final analysis, the definition accorded by the *Friedman* Court to the term "jurisdiction" is not unusually restrictive. Rather, the Eighth Circuit adopted a reasonably broad common-sense view that reflects a widely understood concept of the term. Consequently, the holding in *Friedman*, far from being inconsistent with existing case law, fits within the mainstream of authority recognizing the necessity for the imposition of reasonable limits on § 1001.

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[7] 29 U.S.C. § 159(c)(1) provides in relevant part:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board • • • the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

B. EVEN IF THE TERM "JURISDICTION" MAY, IN NORMAL USAGE, IMPLY A BROADER CONCEPT THAN THAT ACCORDED BY *FRIEDMAN*, IN THE CONTEXT OF 18 U.S.C. § 1001, THE INTERPRETATION ADOPTED BY *FRIEDMAN* IS CORRECT

1. The Rule Of Lenity Mandates Rejection Of Petitioner's Expansive Reading Of The Statute

The petitioner, in arguing that the broadest possible meaning be attached to the term "jurisdiction" in § 1001, runs afoul of "an ancient rule of statutory construction and an oft-repeated one that penal statutes should be strictly construed against the government . . . and in favor of persons on whom such penalties are sought to be imposed." 3 C. Sands, *Sutherland Statutory Construction*, § 59.03, pp. 6-7 (4th ed. 1974). This Court has remarked that " 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). See also, *Ladner* v. *United States*, 358 U.S. 169, 177-8 (1958); and *Whalen* v. *States*, 445 U.S. 684, 596 (1980). This rule of lenity is particularly applicable to the case at bar.

First, the key term, "jurisdiction" is not easily susceptible to a single clear and definite meaning. In fact, petitioner concedes as much. Brief for the United States, p. 14. The ambiguity inherent in the word "jurisdiction" renders petitioner's reliance on *Russello* v. *United States*, *supra*, and similar cases misplaced (Brief for the United States, pp. 11-12); for the rule of construction announced in those cases depends upon statutory language that is "unambiguous." Brief for the United States, p. 11.

Second, as will be discussed below,[8] legislative history reveals that Congress, in enacting the statutory language at

[8] See pp. 32 to 38, *infra*.

issue here, did not speak "in language that is clear and definite." *United States* v. *Bass*, *supra*; *Ladner* v. *United States*, *supra*, at 177-178. Consequently, without some showing that Congress intended to reach the conduct involved here, this Court must hesitate before adopting the wide-open interpretation proposed by the petitioner. As this Court has recently noted, one factor that must be considered in determining the reach of a criminal statute is whether the "legislative history . . . fails to evidence congressional awareness of the statute's claimed scope. . . ." *Williams* v. *United States*, 458 U.S. 279, 290 (1982).

Third, the underlying reasons for the rule of lenity have particular application here. One justification for the rule is to insure that all persons are given fair warning as to what behavior will subject them to punishment. C. Sands, *supra*, § 59.03 at 7. In the present case, not only are the words of the statute unclear, but the defendant, in making only oral, unsworn statements on the telephone had no occasion to be put on notice that what he was doing could subject him to imprisonment for up to five years.[9]

Another reason for strict construction is "to protect the individual against arbitrary discretion by offiials and judges." C. Sands, *supra*, § 59.03 at 8. Adoption of petitioner's dangerously expansive view of the statute would subject not only individuals like Rodgers to severe punishment, but also those who falsely deny their guilt or those, like Mr. Friedman, who complain about police mistreatment. In fact, as the *Friedman* Court noted, "anything more than a casual social conversation with a government employee would, without warning, subject the speaker to the possibility of severe criminal punishment." *Friedman* v. *United States*, *supra*, at 366. It is

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[9] A review of the "Stipulation of Facts in Connection with Defendant's Pretrial Motion to Dismiss Indictment," filed December 8, 1982, and the transcript of the proceedings taken on December 3, 1982, filed January 7, 1983 do not show that the defendant was at any time warned about possible criminal liability in making false statements to the agency.

not enough to say, as the petitioner does, that the Department of Justice, "as a matter of prosecutive policy" does not pursue certain types of cases (Brief for the United States, p. 11, n. 2); for there can be no assurance that such a policy will not change. In the absence of a reasonable construction of § 1001 pursuant to the well recognized rule of lenity, there is no judicial protection for the individual who may be a victim of prosecutorial bad judgment or harassment.

It is true, of course, that the "rule of strict construction does not require that penal statutes be given the 'narrowest meaning' that the words of the statute ill allow" (C. Sands, *supra*, § 59.06 at 18), nor is respondent seeking such a construction. Rather, respondent urges that to interpret the term "jurisdiction" in the context of § 1001 in the broadest possible manner as the petitioner suggests is inapproprate in view of the ambiguity of the language, the uncertainty of the legislative history, and the strong applicability to this criminal statute of the rule of lenity.

2. Petitioner's Proposed Construction Would Produce Absurd And Unjust Results.

In addition to the requirement of strict construction in penal matters, there is another rule of statutory construction which militates against acceptance of petitioner's uncompromisingly literal interpretation of § 1001. As this Court has noted, "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is . . . a traditional and appropriate function of the courts. . . ." *Sorrells* v. *United States*, 287 U.S. 436, 450 (1932). Adoption of petitioner's overly broad concept of "jurisdiction" would have unfortunate results.

First, should this statute be construed to embrace unsworn, oral statements made to investigative agencies, it would be tantamount to declaring that "Congress considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before

a court of law." *Friedman* v. *United States*, *supra*, at 366. This is so because at the time of its enactment, the predecessor statute to § 1001 provided for a punishment that was more severe than that provided by the general perjury law.[10] It is not an adequate answer to this legitimate concern to say that the "matter of penaltes lay within the discretion of Congress." *United States* v. *Gilliland*, *supra*, at 95; Brief for the United States, p. 32. While this statement is undoubtedly correct as far as it goes, such disparity in penalties may not only produce absurd results, but also provide some indication of legislative intent. It is difficult to conceive that Congress wanted to punish spontaneous oral statements to the F.B.I. as or more severely than carefully rehearsed testimony under oath in a court of law. Such a construction is especially difficult to accept in the absence of clear legislative intent authorizing it.[11]

While it may be correct to say that misstatements to the F.B.I. can have serious consequences (Brief for the United States, pp. 33-34), it is to strain the point beyond all measure to maintain that perjury in a court of law is not a greater misdeed. After all, a witness at a trial is placed under oath and given fair warning of the consequences of a lie. Moreover, thee results of perjury are not simply a fruitless investigation conducted by an agency designed to investigate claims, but may be the irreparable loss of a persons's property, freedom, or even life. It is absurd to assume that Congress could have viewed an informal, unsworn fiction more seriously than perjured testimony in a court of law.

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[10] 18 U.S.C. § 1621, the general perjury statute, provides a penalty of not more than five years' imprisonment and a $2,000 fine, whereas, 18 U.S.C. § 1001 presently provides for a period of imprisonment not to exceed five years and a $10,000 fine. Significantly, in 1934, when Congress enacted the language at issue in this case, the false statement statute allowed incarceration for up to ten years, as well as a $10,000 fine. 48 Stat. 997. The maximum period of imprisonment was subsequently reduced to five years in 1948. 18 U.S.C. § 287, 18 U.S.C. § 1001.

[11] See *infra* pp. 32 to 38.

But petitioner argues that since the *Friedman* construction fails to alleviate all possible sentencing anomalies, it must be discarded as ineffectual. Brief for the United States, p. 33. The short answer to this contention is that while the Friedmen approach may not be a panacea, nevertheless, its commonsense interpretation of § 1001 avoids serious incongruities in the law. A logical solution to a thorny problem ought not to be ignored simply because it does not address every possible difficulty that may arise. Moreover, the various false statement provisions cited by petitioner (Brief for the United States, p. 33) illustrate that Congress does not hesitate to provide smaller penalties for less serious instances of false statements. Brief for the United States, p. 33, n. 16. If Congress had intended to reach similar kinds of false statements to the F.B.I. or Secret Service, then surely it would have provided a penalty range commensurate with that offense. Congress' failure to do so is an indication of its lack of intent to reach this kind of conduct.

Acceptance of petitioner's unreasonable broad view of § 1001 would hav undesirable consequences in another way. Numerous statutes authorize officials of various departments and agencies to administer oaths to those from whom information is sought.[12] An overbroad interpretation of § 1001 would render many of those provisions superfluous. If an oral statement to an investigative officer is held to fall within the "jurisdiction" of an agency for purposes of § 1001, there would be little incentive to take the trouble of placing a subject under oath. *Friedman* v. *United States*, *supra*, at 367. The fact that oaths may "serve an important function in reminding individuals of their obligation to tell the truth and in serving notice that false statements could subject them to criminal prosecution" (Brief for the United States, p. 36) merely underscores the need to avoid giving § 1001 the kind of effect that

[12] For a list of some of these statutes, see *United States* v. *Levin*, 133 F.Supp. 88, 90 (D. Colo. 1953).

would tend to eliminate or at least reduce the instances in which an oath is routinely administered.

This is particular concern with respect to the F.B.I. and Secret Service. The present authority of those bureaus to administer oaths in investigations involving fraud against the United States or misconduct of a governmental employee (see 5 U.S.C. § 303) would be seriously compromised by an overly literal interpretation of § 1001. Petitioner asserts that this overlap need not concern this Court since such authority to administer oaths is not immediately implicated in this case. Brief for the United States, p. 36. Petitioner, however, offers no explanation as to how this broad view of "jurisdiction" can be distinguished so that it does not also become applicable to those occasions on which an oath is permitted to be given. If it is held that statements to an investigative agency fall within the purview of the statute, there is nothing to prevent a prosecutor from bringing an indictment under § 1001 even in instances where an oath could have been administered but was not. In fact since the punishment provided under § 1001 is somewhat greater than that allowed by the general perjury statute,[13] there may be a disincentive to administer the oath in precisely those situations which Congress felt is especially important to do so.

A third area of concern involves the effect upon the judiciary of an expansive view of § 1001. As noted by the *Friedman* Court, "[s]ince the judiciary is an agency of the United States Government, a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Id.* at 367. Petition responds to what he considers the Court's "makeweight" concern by noting that some jurisdictions have restrictively interpreted the term " 'department or agency' " to generally exclude the federal judiciary from coverage. Brief for the United States, p. 37. It is interesting to note that the petitioner finds it necessary

[13] See p. 26, n.10, *supra*.

at last to abandon his crusade for an absolutely literal interpretaion of § 1001 and to stand with those authorities that advocate a less than expansive approach to the statute. Certainly, it is difficult to reconcile petitioner's narrow interpretation of the words "department or agency" with his overly generous view of the word "jurisdiction," especially since he earlier cites *United States* v. *Bramblett*, *supra*—a case concerned with the definition of "agency"—for the proposition that "the Court's broad construction of the statute strongly suggests that *all* governmental agencies, regardless of the *nature* of the function they are authorized to perform, are covered by the statute." Brief for the United States, p. 20. (Petitioner's emphasis). Suffice it to say that petitioner fails to explain why it is necessary to broadly construe one section of the statute and narrowly construe another section of that same statute. Such inconsistency only lends weight to the proposition that a doctrinaire or overly literal approach to the statute can be disastrous.

The possibility that the oath requirement in a court of law may be compromised by an aggressively liberal construction of § 1001 is especially disturbing in view of the procedural safeguards provided a defendant under the perjury statutes but not under the false statement law. For instance, since no oath is required by § 1001, a defendant charged under that statute is given no advance warning that what he says may subject him to felony prosecution. In addition, a defendant cannot be convicted for perjury on the basis of the testimony of a single witness. This so-called two-witness rule requires the testimony of at least two witnesses or a single witness corroborated by additional evidence before a perjury conviction can be secured. *Weiler* v. *United States*, 323 U.S. 606, 609-610 (1945). This requirement is not, however generally applicable under § 1001. See *United States* v. *Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967); *United States* v. *Killian*, 246 F.2d 77, 82 (7th Cir. 1957). More recently, in *Bronston* v. *United States*, 409 U.S. 352 (1972), this Court further restricted the scope of the perjury statute by holding that an incomplete, misleading or decep-

tive statement, if literally true, does not constitute perjury. If such a limitation is not applicable in a § 1001 context, then a broad reading of that statute would invite avoidance of the requirements announced by this Court not only in *Weiler*, but in *Bronston* as well.[14] As a result, to adopt at this time the overexpansive view of § 1001 promulgated by petitioner is, as the Eighth Circuit stated in *Friedman*, to bring "about absurd consequences . . . not intended by Congress." *Friedman* v. *United States*, *supra*, at 367, quoting *Sorells* v. *United States*, *supra*, at 446.

C. THE LEGISLATIVE HISTORY CONTAINS NO SUPPORT FOR PETITIONER'S OVERLY EXPANSIVE INTERPRETATION OF § 1001

In view of the ambiguity of the key term "jurisdiction" and the penal nature of the statute involved, the legislative history of § 1001 becomes crucial in determinig whether Congress intended the wide scope claimed for the statue. As this Court has warned, Congress must speak in "language that is clear and definite" before the harsher alternative in a criminal statute is chosen. *United States* v. *Bass*, *supra*, at 347, quoting *United States* v. *Universal C.I.T. Credit Corp.*, *supra*, at 221-222. This admonition takes on added significance when the construction sought to be imposed on the statute leads to "absurd or glaringly unjust results, foreign to the legislative purpose. . . ." *Sorrells* v. *United States*, *supra*, at 450. Petitioner, then, is incorrect in assuming that the Eighth Circuit had some obligation to buttress its reasonable interpretation of § 1001 with support from the legislative background. Brief for the United States, p. 23. Rather, it is the party urging the Court to adopt the harsher alternative in an ambiguously worded criminal statute who bears the responsibility for pointing out evidence of such congressional intent. *United States* v. *Bass*, *supra*; *Ladner* v. *United States*, *supra*; *Williams* v.

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[14] If, on the other hand, the *Bronston* ruling is applicable in a § 1001 context, then other problems arise. For discussion, see *infra* pp. 45 to 46.

United States, *supra*. A review of the legislative history of the false statement statute reveals nothing that would support an attempt to reach unsworn, oral statements given to investigatory agencies. In fact, such a review reveals that at best Congress had no intention of addressing this problem at all.

1. **The *Friedman* Holding Comports With Legislative Intent As Revealed In The Congressional Reports And Debates.**

An extensive re-examination of the congressional history of this statute need not be undertaken here, since this has been thoroughly done by this Court as well as by others on several different occasions. *See*, for example, *United States* v. *Goldfine*, 538 F.2d 815, 823-25 (9th Cir. 1976) (Ferguson, J., dissenting); *United States* v. *Bramblett*, *supra*, at 504-9; *United States* v. *Gilliland*, *supra*, at 91-05; *United States* v. *Stark*, 131 F.Supp. 190, 199-202 (D. Md. 1955); *Friedman* v. *United States*, *supra*, at 366. Nevertheless, certain aspects of that history are particularly relevant to the present issue.

Prior to 1934, the false statement statute reached only pecuniary frauds perpetrated against the United States.[15] In 1934, however, Congress felt it necessary to broaden the scope of this statute so as to provide a punishment for non-monetary frauds. Such frauds were threatening the integrity of certain regulatory agencies created to help the country cope with the economic disaster of the depression. It was at this time that the phrase "within the jurisdiction . . ." was introduced into the statute.

Throughout the legislative history it is made clear that the purpose for the new legislation was, as the Court in *Friedman* noted, to "curtail the flow of false information to the newly

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[15] The predecessor to 18 U.S.C. § 1001, Act of October 23, 1918, Ch. 194, § 35, 40 Stat. 1015 (1918), was construed in *United States* v. *Cohn*, 270 U.S. 320, 346-47 (1926) "as relating to the fraudulent causing of pecuniary or property loss."

created regulative agencies" formed in the wake of the great depression. *Friedman* v. *United States*, *supra*, at 366. For example, the Senate version of the amendment, S. 2686, 73d Cong., 2d Sess. (1934), 78 Cong. Rec. 2152 (1934), was prompted by a letter from the Secretary of the Interior to Senator Ashurst. The Secretary complained about the difficulty of enforcing certain "new deal" programs such as the N.I.R.A. and the P.W.A., as well as promoting fair competition within the petroleum industry in the absence of legislation prohibiting the "presentation of false papers" in these areas. 78 Cong. Rec. 2152 (1934). Significantly, the Committee on the Judiciary, in reporting S. 2686, *supra*, favorably to the full Senate, quoted this very same letter from the Secretary as the "purpose of this legislation." S. Rep. No. 315, 73d Cong., 2d Sess. 1 (1934). There is no evidence that Congress originally had any purpose in considering such legislation other than to address the specific problems noted by the Secretary of the Interior. In fact, the proposed amendment was limited to "matter within the jurisdiction" of the several agencies mentioned by the Secretary.[16] 78 Cong. Rec. 2151, 2858 (1934).

During the course of senatorial debate on S. 2686, *supra*, the phrase "within the jurisdiction of any department or agency of the United States" first appears. 78 Cong. Rec. 2858 (1934). It would be an exaggeration to say that the Senate carefully considered the effect of this language before adopting it. Indeed, the colloquy between Senators Borah and Ashurst makes clear that the Committee on the Judiciary had occasion to consider that option, but refused to so broaden the terms of the law. 78 Cong. Rec. 2858 (1934). It appears from the debates that the phrase, "within the jurisdiction of any department or agency . . ." was added to the bill as a quick concession to Senator Borah, who was concerned that the bill "get all the

[16] S. 2686, *supra*, limited its application to matter "within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry. . ." 78 Cong. Rec. 2152 (1934).

'buzzards.'" 78 Cong. Rec. 2858 (1934). What the Senator meant by "buzzards" is not immediately clear, but within the context of the debate, it is certain that he did not have in mind those who make untrue statements to investigatory agencies like the F.B.I. Instead, the surrounding discussion centered on false bid applications and frauds against the treasury as well as the concerns expressed by the Secretary of the Interior in his letter. 78 Cong. Rec. 2858-59 (1934). In fact, one Senator during the course of this debate wanted to make sure that the amendment would curb "lobbying," and in response, the sponsor of the bill, Senator Ashurst, stated that the new legislation would reach "false affidavits . . . fictitious bids, and so forth." 78 Cong. Rec. 2859 (1934). There is not a hint in any of this discussion that unsworn, oral statements to investigative agencies were envisioned as covered by this language.

While S. 2686, *supra*, was being debated in the Senate, a similar measure, H.R. 8046, 73d Cong., 2d Sess. (1934), 78 Cong. Rec. 3724-25 (1934), was under consideration by the House of Representatives. This version, like the proposal before the Senate, was prompted by the concerns of the Secretary of the Interior. H.R. Rep. No. 829, 73d Cong., 2d Sess. 1-2 (1934). Unlike the Senate Bill, however, the House draft initially contained the broad phrase "within the jurisdiction of any department. . . ." 78 Cong. Rec. 3724-25 (1934). Nevertheless, it does not appear that the House intended to reach unsworn oral statements to investigative agencies. That this was indeed not the intent of Congress is made clear in the Judiciary Committee's Report, H.R. Rep. No. 829, *supra*, accompanying H.R. 8046, *supra*. In that Report, the Committee noted that its chief concern was to prevent "collusive bidding," construction fraud, and unfair practices in the petroleum industry, H.R. Rep. No. 829, *supra*, at 1. The Committee went so far as to quote an official of the Department of the Interior who had testified during the hearings regarding the need for this legislation. The official's statement emphasized the necessity to address problems of "collusive bidding, false statements relative to the financial condition of a community . . .,

misrepresentation relative to the production . . . of petroleum . . ., [and] making of false affidavits relative to public-land matters." H.R. Rep. No. 829, *supra*, at 1-2. In explaining why the proposed legislation was broadened to include any agency or department of the Government, the Committee made reference to the aforementioned letter from the Secretary of the Interior and noted that the bill was rewritten to "punish *such acts* committed before any department. . . ." H.R. Rep. No. 829, *supra*, at 2 (emphasis added). By "such acts," the Committee was apparently referring to the kinds of misrepresentations experienced by regulatory agencies and departments listed in the Secretary's letter. That this is surely the meaning intended is confirmed by the Committee's next phrase, ". . . as, for example, the Reconstruction Finance Corporation." H.R. Rep. No. No. 829, *supra*, at 2.

An examination of the floor debate in the House of Representatives underscores the limited impact intended for this legislation. Rep. McKeown, in explaining the purpose of the bill to his colleagues, noted that the existing false statement statute is to be extended so that it is "applicable to the *new operations* of the Government." 78 Cong. Rec. 3724 (1934) (Emphasis added). By "new operations," the Senator apparently was referring to what the Eighth Circuit in *Friedman* understood to be "the newly created regulative agencies," *Friedman*, *supra*, at 366; for Representative McKeown goes on to provide an example of what he means. He refers specifically to problems with "false affidavits as to . . . material that goes into these projects that the United States Government is lending its money to construct." 78 Cong. Rec. 3724 (1934). The draft was extended, the Congressman notes, to include "every species of fraud where an attempt is made to defraud the United States Government *in any of these operations*." 78 Cong. Rec. 3724 (1934) (Emphasis added). Furthermore, when asked whether "this bill [is] aimed at collusive bidding," Representative McKeown replied, "yes." 78 Cong. Rec. 3724 (1934). And when another Congressman expressed the opinion that the real reason for the bill "is that someone who has to do with

the public works program or the C.W.A. program is afraid that the law is not broad enough to reach violations of some of these *numerous spending organizations . . .*," Representative McKeown responded by recalling the testimony of the official from the Department of the Interior concerning "collusive bidding." 78 Cong. Rec. 3724 (1934) (Emphasis added).[17]

2. Subsequent Legislative Inaction Validates The Eighth Circuit's View Of § 1001.

This legislative history indicates that Congress, in utilizing the term "jurisdiction," did not intend to reach the kind of conduct involved in the present case. Subsequent legislative developments strengthen the validity of this conclusion.

Since the decision in the *Friedman*, case, Congress has on at least two separate occasions considered passing legislation which would broaden the reach of § 1001 to embrace unsworn, oral statements given to law enforcement officers. See, s. 1437, 95 Cong., 1st Sess. § 1343 (1977), and S. 1630, 97 Cong. 1st Sess. § 1343 (1981). In both instances, Congress failed to enact these proposals. While evidence of legislative inaction may in general be a " 'poor beacon' to follow in construing a statute" (2A C. Sands, *supra*, § 49.10 at 261), where the legislature is aware of an interpretation of a statute and refuses to act even then, "there is more reason to regard failure of the legislature

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[17] H.R. 8045, *supra*, was passed by the House on March 5, 1934 (78 Cong. Rec. 3724-25 (1934)) and by the Senate on March 29, 1934. 78 Cong. Rec. 5746 (1934). For reasons irrelevant to the present issue, President Roosevelt vetoed the bill on April 17, 1934. 78 Cong. Rec. 6778-79 (1934). Thereafter, the "within the jurisdiction . . ." language amending the false statement law was attached to another bill, H.R. 8912, 73d Cong., 2d Sess. (1934), H.R. Rep. No. 1463, 73d Cong., 2d Sess. 2 (1934), whose main purpose was to punish vandalism against governmental installations. There was virtually no debate concerning the possible reach of the term "jurisdiction," although Senator King seemed to feel that the main reason for the amendment was to prosecute "kick-back" practices. 78 Cong. Rec. 11270 (1934). H.R. 8912, *supra*, was signed into law on June 18, 1934. 78 Cong. Rec. 12451 (1934).

to change the interpretation as presumptive evidence of its correctness." C. Sands, *supra*, § 49.10 at 263. See also, *Blau* v. *Lehman*, 368 U.S. 403, 412-413 (1962). There can be no question that in 1977 and 1981 Congress was cognizant of the *Friedman* interpretation of § 1001, for the Senate Reports accompanying the proposed legislation discuss in some detail the holding and effects of the *Friedman* decision. See, S. Rep. No. 95-605, 95 Cong., 1st Sess. 371-72 (1977), and S. Rep. No. 97-307, 97 Cong., 1st Sess. 403-4 (1981). Congressional inaction in this instance, therefore, is consistent with the legislative history and with *Friedman's* reasonable view of the scope of the statute.[18]

3. In An Ambiguous Penal Statute, A Broad Police Power Cannot Be Assumed, Absent A Legislative History Indicating Awareness Of The Criminal Scope.

Petitioner maintains that, despite the speeches on the floor of the House and Senate, the explanatory statements offered by the Committees in their reports, and the subsequent legislative history, there is nothing from which to conclude any intended limit on the reach of the statute. As demonstrated above, this simply is not the case. But assuming, for argument's sake, the petitioner is correct, and there is little in the history to indicate any limitation on the statute, petitioner can point to nothing that would show any congressional intention to "revolutionize our criminal justice system. If. . . [Congress] had [such an intention], the measure would surely have been subjected to serious, impassioned, and prolonted debate." *United States* v. *Goldfine*, *supra*, at 825 (Ferguson, J., dissenting). No such "debate," of course, occurred, "Instead the

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[18] It is interesting to note that the most recent incarnation of an Omnibus Criminal Code Revision Act contains no proposal for broadening the scope of the false statement laws. H.R. 2013, 98 Cong., 1st Sess. (1983). Section 1744 of H.R. 2013, *supra*, would make it a Class A misdemeanor to provide false information to any federal organization regarding an emergency situation. H.R. 2013, *supra*, is presently before the Subcommittee on Criminal Justice of the House Committee on the Judiciary.

legislative history is that which one would expect to accompany a non-controversial bill designed to punish those who would seek to frustrate a regulatory scheme, unfairly acquire a privilege, or pirate the federal treasury." *Id.* at 825-6. Petitioner "blithely assume[s] that [in § 1001] Congress granted . . . a sweeping power" (*Friedman* v. *United States*, *supra*, at 366), but it should be this Court's position that "such a formidable police authority must be clearly authorized." *Id.* After all, "if the Congress wanted unsworn statements to investigative officials to serve as the basis for severe criminal punishment . . ., it would have said so in clear, direct and positive terms." *Id.* at 367.

Petitioner argues, though, that congressional failure to consider a subject cannot be taken to mean that the subject was not intended to be covered. The cases relied upon by petitioner in support of this proposition, however, all stress that the meaning of the statute must first be obvious on its face. Brief for the United States, p. 27. Even petitioner is compelled to recognize the ambiguity of the key term "jurisdiction." *Id.* at 7. A case more to the point is *Williams* v. *United States*, 458 U.S. 279 (1982). In that instance, this Court was confronted with an ambiguous penal statute involving a false statement provision. In narrowly construing the reach of that legislation, this Court recognized the significance of "a legislative history that fails to evidence congressional awareness of the statute's claimed scope." *Id.* at 290. As Mr. Justice Rehnquist has noted on another occasion:

> In a case where the construction of legislative language . . . makes so sweeping and so relatively unorthodox a change . . . I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.

Harrison v. *PPG Industries Comm., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

It is understandable that petitioner would wish to subject Mr. Rodgers to punishment. To stretch an existing statute far beyond its intended purpose is not, however, the appropriate

way to achieve that result. Congress is capable of enacting legislation that would specifically reach the behavior involved in this case and, in fact, has twice considered that possibility. That Congress has not as yet passed such a law may indicate the complexity of the problem involved. For in reaching a *Rodgers*, it is difficult not to touch conduct that ought not to be criminalized. *Friedman* v. *United States*, *supra*, at 366; see also, discussion below, pp. 42 to 45. In any event, this is a problem best left to the careful considerations of Congress which is best qualified to weight and balance competing social interests. For the present, the intent of Congress as expressed in the legislative history and as ascertained through the judicious application of statutory rules of construction must not be forsaken out of concern for a particular set of facts and circumstances.

D. POLICY CONCERNS FAVOR ACCEPTANCE OF THE EIGHTH CIRCUIT'S INTERPRETATION OF THE STATUTE.

Although the result reached in *Friedman* is fully justified by the language and legislative history of the statute, there are additional policy concerns which favor adoption of the Eighth Circuit's analysis. The *Friedman* rule serves several useful social and legal functions.

1. *Friedman* Promotes An Open Line Of Communication Between Law Enforcement And The Public.

Friedman's common-sense interpretation of § 1001 promotes "the important social policy that is served by an open line of communication between the general public and law enforcement agencies." *Friedman* v. *United States*, *supra*, at 369.[19] In petitioner's view, innocent persons acting in good faith will not be deterred by the unchecked authority to prosecute oral, unsworn statements. Surely this is a naive position; for the

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[19] See also, Broeder, *Silence and Perjury Before Police Officers*, 40 Neb. L. Rev. 63, 99-100 (1960).

mere threat of a felony prosecution must exercise a chilling effect on the public's interaction with law enforcement agencies. This is especially true where the penalties provided by law are harsh and the individuals with whom criminal investigative agencies such as the F.B.I. must often deal are "underworld" types already suspicious of the legal system. It does little good to argue that the agencies themselves can be trusted not to jeopardize the free flow of information necessary for effective law enforcement. It is the perceived fear of the possibility of a felony charge based on nothing more than an officer's recollection of unrecorded oral statements that will threaten to dry up valuable source information. The irony of the petitioner's position for a wide open interpretation of § 1001 is that such a view of the statute may result, not in the overall deterrence of criminal activity, but in its encouragement. With an unfettered reading of the statute, information that could lead to arrests may be increasingly difficult to obtain.

2. *Friedman* Protects The Exercise Of Civil Rights.

There is also the fear that under an expansive view of § 1001, individuals who have been mistreated while in custody may hesitate to lodge colorable complaints against the offending officers. That this is not an idle concern is evident from the *Friedman* case itself. The facts as related by the Eighth Circuit indicate that the civil rights violations alleged by Mr. Friedman to have occurred may indeed have had some basis in truth. *Friedman* v. *United States*, *supra*, at 365. Nevertheless, Mr. Friedman was tried and convicted under an expansive view of § 1001 and would have gone to jail for his "crime" had it not been for the reasonable approach of the Eighth Circuit. It is difficult to imagine a more effective restraint on the exercise of a prisoner's civil rights than an interpretation of the law that gives the jailer nearly unlimited discretion to determine when a false statement has been made. The *Friedman* rule is necessary to continue to protect the civil rights of those who would not otherwise pursue those rights

our of fear that the authorities may utilize their broad discretion for purposes of self-protection or even revenge.

3. *Friedman* Disposes Of The "Exculpatory-No" Problem.

The rule announced in *Friedman* is useful as well in harmonizing difficult legal and factual problems. The "exculpatory-denial" situation is a good example. Under a literal interpretation of the statute, such a false denial is clearly subject to prosecution. While many courts have allowed for the exception, the rationale for, and exact scope of, and exception are not always made clear. *Paternostro* v. *United States*, 311 F.2d 298, 305 (5th Cir. 1962). Certainly, there is a logical inconsistency in excluding a denial but punishing other kinds of statements. After all, a "denial" may be intrinsically no less false or misleading than any other kind of statement. Moreover, there is often a factual problem in deciding when a statement constitutes a negative "denial" or a positive "statement." See *United States* v. *Bedore*, 455 F.2d 1109 (9th Cir. 1972); *United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974). Under the precedent established by *Friedman*, however, the "exculpatory-no" doctrine is, at least in part, resolved, since virtually any statement to an investigative agency given during the course of an investigation falls outside the scope of the statute.[20]

4. *Friedman* Harmonizes The *Bronston* Problem.

The importance of the *Friedman* precedent becomes apparent in another context as well. Until recently, there has been little question that a statement, if contemplated by the act,

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[20] Petitioner asserts that this Court need not concern itself with the "exculpatory-no" issue, since this case does not directly raise that question. Brief for the United States, p. 10, n. 2. It is difficult to see how a decision in this case could avoid having a very substantial impact in that area. Certainly, adoption of petitioner's wide-open interpretation of § 1001 must be read as at least an implied disapproval of the "exculpatory-no" exception. Petitioner, in any case, makes no suggestion as to the probable effect acceptance of his view might have on the "doctrine."

may be either written or oral. *United States* v. *Beacon Brass*, 344 U.S. 43, 46 (1952). This Court in *Bronston* v. *United States*, 409 U.S. 352 (1973), limited the scope of the perjury statute by ruling that misleading statements which are technically true do not constitute a violation of that law. This ruling has reopened the question of whether oral as well as written statements are "statements" for purposes of § 1001. If a *Bronston* defense is permitted to defendants under § 1001, then that defense is not truly available unless the statement in question is in writing; for, where the statement is not in writing, the defendant may be faced with the difficult, if not impossible, task of "arguing that his statements . . . were literally true on the sole basis of the agent's sketchy notes. . . ." *United States* v. *Ehrlichment*, 379 F.Supp. 291, 292 (D.C. Cir. 1974). In *United States* v. *Poutre*, 646 F.2d 685 (1st Cir. 1980, the need for written testimony as a foundation for a § 1001 charge was seriously considered, since, "what is actually said by a defendant becomes a critically important part of any prosecution under § 1001." *Id.* at 688.[21] See also *United States* v. *Ehrlichman*, *supra*, and *United States* v. *Clifford*, 426 F.Supp. 696 (E.D. N.Y. 1976). Under the *Friedman* precedent, however, the Bronston problem, at least in the context of statements to investigative agencies, is rendered moot, since such statements, whether oral or written, are not cognizable under the statute.[22]

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[21] The *Poutre* Court did stop short of making a blanket ruling that false statements charged under § 1001 must be in writing.

[22] At least one commentator has advocated a limitation of the false statement law to written or recorded statements. Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451, 471-73 (1977). But see, *United States* v. *Fern*, 696 F.2d 1269 (11th Cir. 1983).

II. IN THE ALTERNATIVE, SHOULD THIS COURT IMPOSE A NEW RULE ON THE EIGHTH CIRCUIT AND FIND THAT THE PRESENT INDICTMENT DOES STATE A CRIME, SUCH NEW RULE SHOULD NOT BE APPLIED RETROACTIVELY TO THE DEFENDANT.

Although the *ex post facto* ban found in Article I of the United States Constitution has been held not to apply to judicial decisions, *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915), the rationale behind the constitutional prohibition has been extended by analogy to court rulings. Thus, this Court has said that, under the Due Process Clause, an appellate court may not do what the *Ex Post Facto* Clause prohibits the legislature from doing. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Rabe* v. *Washington*, 405 U.S. 313 (1972); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Marks* v. *United States*, 430 U.S. 188 (1977). In *Bouie*, for example, a state appellate court upheld the defendant's conviction and in so doing interpreted a state statute in a new and unexpected manner. This Court, in reversing the conviction, found that the State Court had expanded the reach of the statute to include what had previously been thought to be innocent conduct. Such

> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction . . . The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.

Id. at 353-4, quoting, Hall, *General Principles of Criminal Law* (2d ed. 1960) at 58-59.

While due process protection against retroactive judicial decisions may not be coextensive with the *ex post facto* ban

against legislation that attempts to reach prior acts, W. LaFave, A. Scott, Jr., *Criminal Law*, Chapter 2, § 12 (1972 ed.) at 94-95, there can be little question that the due process guarantee extends to cases where an appellate court has declared heretofore non-criminal conduct to be in fact within the ambit of the law. As noted by W. LaFave and A. Scott:

> Perhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal. For example, the later decision may . . . interpret a criminal statute as covering conduct previously held to be outside this statute. Under such circumstances, the overruling decision (whether on appeal of the defendant's case or in another case decided subsequent to his conduct) is not applied retroactively, . . .

W. LaFave, A. Scott, *supra*, at § 12, 94-95.

To be sure, the *Bouie* decision does not specifically involve a judicial reversal of a prior holding, but rather concerns a judicial interpretation of a state statute not previously construed. Nevertheless, the rationale of the *Bouie* holding has been applied in circumstances very similar to the case at bar. In *United States* v. *Goodheim*, 651 F.2d 1294 (9th Cir. 1981), the issue was whether a Supreme Court decision interpreting expansively the word "convicted" in 18 U.S.C. § 1202(a)(1) [felon in possession of a firearm] could be applied retroactively to the defendant. The Ninth Circuit held that retroactively application of that Supreme Court ruling would, in view of *Bouie*, be "barred by the due process clause of the fifth amendment." *United States* v. *Goodheim*, *supra*, at 1298. A similar result on somewhat different facts was reached in *United States* v. *Wasserman*, 504 F.2d 1012 (5th Cir. 1974).[23]

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[23] The *Wasserman* case involved the application to a particular defendant of a new interpretation of an obscenity law. Siginificantly, the *Wasserman* Court found a violation of due process despite the *Bouie* Court's notation that *ex post facto* considertions are especially compelling where the conduct is not improper or immoral.

Applying these principles to the present case, it is clear that should this Court adopt petitioner's plea and render false oral statements to an investigatory agency culpable under § 1001, such holding would be a wide departure from previous rulings in the Eighth Circuit and could not be applied to this defendant without depriving him of due process of law. This conclusion is particularly compelling in view of the fact that the Court in *Friedman*, in holding that investigative agencies such as the F.B.I. do not possess the "jurisdiction" required by the statute, gave no indication that this interpretation was in any way limited to the particular facts of that case. Rather, the rule was intended to promote a broad social policy and hence must be considered to have general applicability.

Nor can it be argued successfully that no due process violation has occurred in this case becuase the defendant was not shown to have been aware of the *Friedman* case and, therefore, must have known that what he did was against the law. First, there is no indication in the present record that the defendant was ever warned by an agent of the F.B.I. or the Secret Service that he could be liable for making fictitious statements to those agencies. See, Transcript of Proceedings taken on December 3, 1982, filed January 7, 1983 (J.A. 2); and "Stipulation of Facts in Connection with Defendant's Pretrial Motion to Dismiss the Indictment," filed December 8, 1982 (J.A. 1). Second, the language in § 1001, particularly the term "jurisdiction," is subject to various interpretations and provides "inadequate guidance to the individual whose conduct is regulated." *Bouie* v. *City of Columbia*, *supra*, at 353, quoting, Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 541 (1951). Where courts cannot agree on the meaning of a statute, it is unreasonable to expect the average citizen to make an accurate guess as to the conduct prohibited. Finally, personal knowledge of a defendant is not a factor in determining whether due process has been denied. As this Court stated in *Bouie:*

> The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis

> of the statute itself *and the other pertinent law*, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants.

Id. at 355-56, n. 5. (Emphasis added).

A redefinition of the word "jurisdiction" at this time without any prior warning would have the result of suddenly widening the reach of the statute so as to make criminal for the first time in the Eighth Circuit conduct which heretofore had been declared no violation of the law. Such a judicial reconstruction of this criminal statute would be, in light of past pronouncements by the Eighth Circuit, " 'unexpected . . .,' [and, as a result] it must not be given retroactive effect." *Bouie* v. *City of Columbia*, *supra*, at 354, quoting, Hall, *supra*, at 61.

CONCLUSION

WHEREFORE, the judgment of the Court of Appeals should be affirmed. In the alternative, any new rule of law should not be applied retroactively to the defendant, since to do so would violate the Fifth Amendment's guarantee for due process of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. We showed in our opening brief (at 12-23) that in common, everyday usage the word "jurisdiction" means simply the power to exercise whatever authority one has been granted. Although respondent quarrels over the plain meaning of "jurisdiction," he does not dispute the maxim that "the legislative purpose is expressed by the ordinary meaning of the words used." Resp. Br. 7 (citations omitted).[1] Accordingly, if we are correct about the plain meaning of the words contained in Section 1001, resort to the

[1] While we acknowledged (Br. 14-15) that the making of monetary awards, the granting of governmental privileges and the promulgation of administrative determinations constitute one form of jurisdiction, even respondent does not contend that this restrictive definition of "jurisdiction" alone constitutes the "ordinary meaning" of the word.

legislative history is unnecessary.[2] In any event, as we showed in our opening brief (at 23-31), the history of Section 1001 provides no basis whatever for the Eighth Circuit's refusal to apply the statute to false statements made to the FBI and Secret Service. Moreover, respondent's reliance (Br. 29-30) on legislative activities that took place more than 40 years after the critical language was added to the statute for "validat[ion]" of the Eighth Circuit's view is wholly misplaced. Not only is post-enactment legislative history generally accorded little weight (see *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977)), but the particular history relied on by respondent, if anything, indicates that Congress did not intend the restrictive construction of Section 1001 that the Eighth Circuit has imposed.

Legislation was introduced in both the 95th and 97th Congresses that would have made clear that it is a violation of Section 1001 to volunteer intentionally false information to a federal law enforcement officer. See S. 1630, 97th Cong., 1st Sess. §1343 (1981); S. 1437, 95th Cong., 1st Sess. §1343 (1977). Contrary to respondent's suggestion (Br. 29-30 & n.18), the legislative history of both bills reveals that the Senate deemed them necessary not because it viewed current Section 1001 as not reaching the conduct at issue, but rather to correct what it perceived to be the erroneous, unduly restrictive construction that had been placed on it by

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[2]For the same reason, respondent's heavy reliance (Br. 17-19) on the rule of lenity is entirely misplaced. *McElroy* v. *United States*, 455 U.S. 642, 659 (1982); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955) (footnote omitted) ("[t]hat criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

the Eighth Circuit. See S. Rep. 97-307, 97th Cong., 1st Sess. 401-408 (1981); S. Rep. 95-605 (Pt. 1), 95th Cong., 1st Sess. 370-376 (1977).

Nor does Congress's failure to have enacted either bill suggest that it agrees with the Eighth Circuit's view. In both cases, the proposed amendment of Section 1001 was part of a more extensive, controversial revision of the entire federal criminal code. There is not a shred of evidence in the relevant legislative history that Congress's failure to enact either S. 1437, the Criminal Code Reform Act of 1977, or S. 1630, the Criminal Code Reform Act of 1981, was due to any dissatisfaction with the proposed clarification of the false statements law. This case thus illustrates dramatically why, as even respondent acknowledges, legislative *in*action generally is viewed as a "poor beacon" to follow in construing a statute. Resp. Br. 29, quoting 2A C. Sands, *Sutherland Statutory Construction* §49.10 (4th ed. 1973).[3]

2. Respondent also makes several policy related arguments (Br. 19-24, 32-35) that he contends show a legislative intent to exclude from the coverage of Section 1001 false statements made to law enforcement officers. Since these same factors were relied on by the court of appeals, we responded to most of them in our opening brief (at 31-39). Accordingly, we add only a brief further reply here.

Significantly, the logical result of accepting these arguments of respondent would be the repeal of Section 1001, not merely limitation of its application to regulatory agencies. See generally Note, *Criminal Law-Federal Fraud and*

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[3]For this same reason, the absence from the currently pending proposed revision of the federal criminal code, H.R. 2013, 98th Cong., 1st Sess. (1983), of any amendment to the false statements statute (Resp. Br. 30 n.18) sheds no light on the question whether Congress, in 1934, intended the statute to cover intentionally false statements volunteered to the FBI or Secret Service.

False Statements Act-Federal Bureau of Investigation Covered, 14 Wayne L. Rev. 642, 648-650 (1968). For example, respondent suggests (Br. 34-35) that Section 1001 should not be applied to false statements made to law enforcement officers because, since the statute does not require that such statements be in writing, a defendant charged under Section 1001 cannot make meaningful use of the *Bronston* defense.[4]

But even assuming the correctness of the decisions that permit a defendant in a Section 1001 prosecution to raise a *Bronston* defense (see note 4), one in respondent's position could make no use of the defense, since the charges against him were based on concededly *volunteered* statements, not on answers given in response to questioning. Moreover, if the *Bronston* defense were to be made available to defendants charged under Section 1001, it would be equally available to defendants charged with making false statements to regulatory agencies as to defendants who are alleged to have made false statements to investigatory agencies; neither statements made to regulatory agencies nor statements made to investigatory agencies must be in writing in order to be cognizable under the statute. Accordingly, respondent's *Bronston* argument provides no basis for construing Section 1001 to reach only false statements made to regulatory agencies.

Furthermore, there is no substance to respondent's concern (Br. 23) that defendants who are charged under Section 1001 with making false statements before a court of law will

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[4]In *Bronston* v. *United States*, 409 U.S. 352 (1973), the Court held that a perjury conviction cannot be based on an answer, given under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication. Some lower courts have extended the benefit of *Bronston* to defendants charged under Section 1001. See *United States* v. *Poutre*, 646 F.2d 685, 687-688 (1st Cir. 1980); *United States* v. *Clifford*, 426 F. Supp. 696, 701-703 (E.D. N.Y. 1976); *United States* v. *Ehrlichman*, 379 F. Supp. 291 (D.D.C. 1974).

be deprived of the protection of the "two-witness rule," to which, he asserts, they would be entitled if they were charged with perjury. In the first place, as we noted in our opening brief (at 36-37), every court that has considered the issue has refused to apply Section 1001 to false statements made during judicial proceedings on the ground that the phrase "department or agency," as used in the statute, applies to the federal judiciary only with respect to its housekeeping or administrative functions, not with respect to judicial proceedings themselves. Moreover, even assuming that Section 1001 does apply to false statements made in the context of judicial proceedings, a defendant in such a prosecution would not be deprived of any procedural protection that routinely attaches to a defendant charged with perjury before a court of law. In 1970, Congress eliminated the "two-witness" requirement with respect to prosecutions for perjury committed before a court or grand jury. See 18 U.S.C. 1623(e).[5]

3. Finally, respondent contends (Br. 36-39) that even if the Court should adopt the construction of Section 1001 that we urge, its decision nevertheless should not be applied to him because the conduct with which he was charged was not criminal in the Eighth Circuit at the time he committed it. This argument also lacks merit.

Respondent mistakenly relies on a series of decisions beginning with *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). *Bouie* held that the Due Process Clause precluded the conviction of two black college students for refusing to leave an "all-white" lunch counter where, prior to the conduct at issue, South Carolina's criminal trespass statute had

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[5]In addition, the maximum penalty provided by Section 1623(a) for perjury committed before a court or grand jury is the same as the maximum penalty provided for violation of Section 1001 — five years' imprisonment and a $10,000 fine.

never been construed to cover the type of conduct in which the students engaged. The Court explained (378 U.S. at 354-355; emphasis added):

> When a[n] * * * *unforeseeable* state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

See also *Marks* v. *United States*, 430 U.S. 188 (1977); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Rabe* v. *Washington*, 405 U.S. 313 (1972).

These decisions are inapposite to the present case. In the first place, as the Court noted in *Bouie*, 378 U.S. at 349 n.1, the South Carolina criminal trespass statute on its face prohibited only the "[e]ntry on lands of another after notice prohibiting same." The statute thus gave the defendants in that case "no reason even to suspect that [their refusal to *leave* the lunch counter would] be retroactively brought within it by an act of judicial construction" (*id.* at 352). By contrast, as we showed in our opening brief (at 11-23), respondent's conduct falls clearly within the plain language of Section 1001.

Moreover, at the time respondent made his false crime reports to the FBI and the Secret Service, the Eighth Circuit was the only court of appeals to have held that Section 1001 does not cover such conduct. As we discussed in our opening brief (at 9-10), two other courts of appeals — the Second Circuit in *United States* v. *Adler*, 380 F.2d 917, cert. denied, 389 U.S. 1006 (1967), and the en banc Fifth Circuit in *United States* v. *Lambert*, 501 F.2d 943 (1974) — had held precisely to the contrary. In these circumstances, a

decision by this Court to the effect that respondent's conduct was within the statutory prohibition surely would not be "unforeseeable."[6]

Here, respondent makes no claim that he actually relied on the Eighth Circuit's decision in *Friedman* v. *United States*, 374 F.2d 363 (1967), when he engaged in the charged conduct. There is no justification for refusing to apply a concededly correct construction of a statute to a defendant because of the existence of a prior, erroneous interpretation of the statute, in the absence of a finding that the defendant relied on the prior construction. Particularly in a case such as this one, where the alleged misconduct is manifestly antisocial, there is no unfairness in applying the statute so as to reach the defendant's conduct in the absence of any showing that he relied on the existence of prior precedent to the contrary.[7]

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[6]Respondent's reliance on *Marks* v. *United States*, 430 U.S. 188 (1977), likewise is unavailing. The defendants in that case were convicted of transporting obscene materials in interstate commerce in violation of a federal statute. Their allegedly unlawful conduct, however, occurred before this Court had rendered its decision in *Miller* v. *California*, 413 U.S. 15 (1973), which "announced new standards for 'isolat[ing] "hard core" pornography from expression protected by the First Amendment' " (430 U.S. at 190, quoting 413 U.S. at 29). Relying in part (430 U.S. at 192) on *Bouie*, the Court held that the Due Process Clause precluded application of the *Miller* standards to the defendants in *Marks*. In *Marks* the Court was concerned that the defendants' conduct might have been permissible under then prevailing *Supreme Court* precedent (*i.e.*, *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966) (plurality opinion)). By contrast, as noted in the text above, the pertinent law was unsettled at the time of respondent's misconduct, and it was thus entirely foreseeable that the making of false crime reports might subject him to criminal liability.

[7]Respondent's assertion (Br. 38) that his reliance vel non on *Friedman* is irrelevant because "there is no indication in the present record that [he] was ever warned by an agent of the F.B.I. or the Secret Service that he could be liable for making fictitious statements to those agencies" is entirely misdirected. Warnings by the victim agencies has never

The opinions for five Justices of this Court in *James* v. *United States*, 366 U.S. 213 (1961), support the position we urge here. *James* held that embezzled funds are includible in the gross income of the embezzler in the year in which they are misappropriated, thus overruling the prior decision in *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946). In view of the existence of the prior precedent, however, three Justices held that James' conviction for "willfully" attempting to evade taxes could not stand. 366 U.S. at 221-222 (opinion of Warren, C.J.). Notwithstanding that *Wilcox* was a decision of this Court, not, like *Friedman*, a court of appeals' decision on an issue concerning which the circuits are divided, three other Justices were of the view that, not only should *Wilcox* be overruled, but James' conviction should have been affirmed in the absence of any showing that he in fact

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been deemed an element of the offense described in Section 1001. Moreover, as we showed in our opening brief (at 11-23), the statute on its face provides ample indication that it includes conduct such as the false crime reports made by respondent. Respondent also relies (Br. 38-39) on this Court's suggestion in *Bouie*, 378 U.S. at 355-356 n.5, that "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants." But that observation by the Court, made apparently in response to a suggestion by the City that the defendants "at one point testified that they had intended to be arrested" (378 U.S. at 355 n.5), was only dictum. The Court went on to explain (*id.* at 356 n.5) that any such statement by the defendants did not necessarily indicate an understanding by them that their conduct was violative of the criminal trespass statute on which they ultimately were convicted: "[T]he record is silent as to what [the defendants] intended to be arrested for, and in fact what they *were* arrested for was not trespass but breach of the peace — on which charge they were not convicted. Hence there is no basis for an inference that [the defendants] intended to be arrested *for violating this statute*, either by remaining on the premises after being asked to leave or by any other conduct." See also *James* v. *United States*, 366 U.S. 213, 241 (1961) (opinion of Clark, J.); *id.* at 241-245 (opinion of Harlan, J.); *id.* at 223-225 (opinion of Black, J.).

had placed "bona fide reliance" on the prior decision. 366 U.S. at 241 (opinion of Clark, J.); *id.* at 241-245 (opinion of Harlan, J.). Moreover, although Justices Black and Douglas concurred in the judgment of reversal on the ground that *Wilcox* should not be overruled, they "dissent[ed] from the way the majority of the Court overrules *Wilcox*. If the statutory interpretation of 'taxable income' in *Wilcox* is wrong, then James is guilty of violating the tax evasion statute for the trial court's judgment establishes that he embezzled funds and wilfully refrained from reporting them as income" (*id.* at 223).[8]

The majority of the courts of appeals that have considered the question agree with this view. See *United States* v. *Seregos*, 655 F.2d 33 (2d Cir. 1981), cert. denied, 455 U.S. 940 (1982); *United States* v. *Polizzi*, 493 F.2d 570 (3d Cir. 1974); *United States* v. *Mercado*, 478 F.2d 1108 (2d Cir. 1973); *United States* v. *Camara*, 451 F.2d 1122 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972). *Polizzi, Mercado* and *Camara* all addressed the question whether *Ehlert* v. *United States*, 402 U.S. 99 (1971) — which held that an individual who does not declare conscientious objector status until after he receives his induction notice may be prosecuted for draft evasion without having received a status hearing by his local draft board — should be applied retroactively in circuits where it overturned existing law. In upholding such retroactive application, the First, Second, and Third Circuits emphasized that the defendant in each of those cases had made no showing that he in fact was aware of or had relied upon the pre-*Ehlert* case law in his circuit and that, in any event, any such reliance would have been wholly unjustified in view of the widespread disagreement

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[8]The remaining Justice, Justice Whittaker, also disagreed with the Court's overruling of *Wilcox* without expressing any opinion on the prospectivity of the Court's ruling (*id.* at 248-258).

among the courts of appeals prior to this Court's decision in *Ehlert*. See *United States* v. *Polizzi*, 493 F.2d at 573; *United States* v. *Mercado*, 478 F.2d at 1111; *United States* v. *Camara*, 451 F.2d at 1124-1125. See also *United States* v. *Kirkpatrick*, 446 F.2d 1371, 1373 (10th Cir. 1971).[9]

Likewise, the defendant in *Seregos* had been convicted under the Travel Act, 18 U.S.C. 1952, on the basis of a violation of New York State's commercial bribery statute. The question presented by the case was whether that conviction violated due process because the underlying misconduct had occurred before *Perrin* v. *United States*, 444 U.S. 37 (1979), held that the Travel Act extended to commercial bribery and at a time when the prevailing law in the Second Circuit was to the contrary. See *United States* v. *Brecht*, 540 F.2d 45 (1976), cert. denied, 429 U.S. 1123 (1977). The court of appeals found no due process violation under *Bouie* or *Marks* because, it held, the language of the Travel Act appears on its face to cover commercial bribery under state law. 655 F.2d at 36. Nor, in the court of appeals' view (*ibid.*), could *Perrin* be viewed as an "unforeseeable" judicial expansion of the scope of the Act, in light of *United States* v. *Pomponio*, 511 F.2d 953, cert. denied, 423 U.S. 874 (1975), in which the Fourth Circuit had held, prior to Seregos' misconduct, that the statute applied to commercial bribery.

As respondent notes (Br. 37), the Ninth Circuit has reached a position at odds with the above line of authority. *United States* v. *Goodheim*, 651 F.2d 1294, reh'g denied,

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[9]This Court noted the *Mercado* decision in *United States* v. *Jenkins*, 420 U.S. 358, 363 n.5 (1975), but expressed no opinion on its validity.

664 F.2d 754 (1981).[10] In that case, the court reversed the defendant's convictions on several gun control charges and remanded for a hearing to determine whether there was a constitutional defect in the proceedings underlying the predicate conviction, because Ninth Circuit law at the time of the offenses was that such a defect would be a defense to gun control charges — a view subsequently rejected by this Court in *Lewis* v. *United States*, 445 U.S. 55 (1980).[11] For the reasons already stated, we believe that *Goodheim* was incorrectly decided.[12]

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[10]Indeed, the Ninth Circuit has gone so far as to hold that a defendant may not be convicted of willfully aiding and abetting the preparation of fraudulent income tax returns in the absence of prior decision condemning the precise "tax shelter" program alleged, notwithstanding the lack of any precedent affirmatively approving the scheme, *United States* v. *Dahlstrom*, 713 F.2d 1423 (1983), petition for cert. pending, No. 83-1297 (filed Feb. 6, 1984).

[11]In a petition for rehearing addressed to the panel in *Goodheim*, the government pointed out that the court of appeals' decision conflicted with *United States* v. *Polizzi*, *supra*, and *United States* v. *Mercado*, *supra* (discussed at pages 9-10, *supra*). In denying the petition in *Goodheim*, the court of appeals distinguished *Polizzi* and *Mercado* on the ground (664 F.2d at 756 & n.2) that this Court had granted certiorari in *Ehlert* before the misconduct charged in each of those cases had been committed. This distinction is specious; in our view, invocation by a defendant of favorable case law prevailing in his own circuit is no less justified in the face of conflicting decisions in other circuits than in the face of this Court's having indicated a willingness to review one of those conflicting decisions. (Indeed, if anything, in view of the fact that it was the *defendant's* petition for certiorari that was granted (over the government's opposition) in *Ehlert*, the expectation might have been that this Court was inclined to agree with the defendant's position.)

Largely because the proceedings in *Goodheim* were still interlocutory, the Solicitor General declined to petition for a writ of certiorari in that case. The government prevailed on the remand hearing in the district court, whereupon Goodheim's conviction was affirmed by the court of appeals. 686 F.2d 776 (1982).

[12]Respondent's further reliance (Br. 37 & n.23) on *United States* v. *Wasserman*, 504 F.2d 1012 (5th Cir. 1974), is misplaced. That case presented the identical question that this Court subsequently decided in

Were respondent to claim that he actually relied on *Friedman* in deciding to make his false statements to the FBI and the Secret Service, a more colorable claim might be presented. He has not done so, and because the indictment was dismissed prior to trial, it would be premature for this Court to pass on the merit of such a claim. All that need be decided is that Section 1001 may properly be applied in accordance with this Court's interpretation to one who has not actually relied on a contrary prior interpretation by the court of appeals.

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

Marks, viz., whether the standards articulated in *Miller* v. *California*, *supra*, should be applied retroactively; the Fifth Circuit, like this Court, answered in the negative (see 430 U.S. at 189 n.1). As we explained in note 6, *supra*, the question of the retroactivity of *Marks* is quite different from the question presented here.

No. 8[illegible]320-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Larry Wayne Rodgers

Docketed:
October 13, 1983

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Moskowitz, Albert N.

Entry	Date	Note	Proceedings and Orders
1	Sep 12 1983		Application for extension of time to file petition and order granting same until October 23, 1983 (Blackmun, September 14, 1983).
2	Oct 13 1983	G	Petition for writ of certiorari filed.
3	Nov 16 1983		DISTRIBUTED. December 2, 1983
4	Nov 22 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Nov 22 1983	X	Brief of respondent Larry Wayne Rodgers in opposition filed.
6	Nov 29 1983	X	Reply brief of petitioner United States filed.
7	Dec 5 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Dec 5 1983		Petition GRANTED.
			**********
9	Dec 19 1983	G	Motion of respondent for appointment of counsel filed.
10	Jan 9 1984		DISTRIBUTED. January 13, 1984. (Motion of respondent for appointment of counsel).
11	Jan 16 1984		Motion for appointment of counsel GRANTED and it is ordered that Albert N. Moskowitz, Escuire, of Kansas City, Missouri, is appointed to serve as counsel for the respondent in this case.
13	Jan 18 1984		Order extending time to file brief of petitioner on the merits until January 30, 1984.
14	Jan 30 1984		Brief of petitioner United States filed.
15	Jan 30 1984		Joint appendix filed.
16	Feb 9 1984		Record filed.
17	Feb 9 1984		Certified original record & C.A. proceedings, 3 volumes received.
18	Feb 14 1984		SET FOR ARGUMENT. Tuesday, March 27, 1984. (2nd case)
19	Mar 6 1984	X	Brief of respondent Larry Wayne Rodgers filed.
20	Mar 19 1984	X	Reply brief of petitioner United States filed.
21	Mar 27 1984		ARGUED.